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No. 08-

IN THE

Supreme Court of the United States

CAMERON FRAZIER,

Petitioner,

—v.—

DR. ERIC J. SMITH, Commissioner,
Florida Department of Education, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JAMES K. GREEN
JAMES K. GREEN, P.A.
Suite 1650, Esperantè
222 Lakeview Avenue
West Palm Beach, Florida 33401
(561) 659-2029

RANDALL C. MARSHALL
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF FLORIDA, INC.
4500 Biscayne Blvd, Ste 340
Miami, Florida 33137-3227
(786) 363-2700

QUESTION PRESENTED

Whether a state, consistent with this Court's holding in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), may condition a student's decision, based upon his personal beliefs and convictions, to decline to recite the pledge of allegiance upon the advance, written consent of a parent?

PARTIES TO THE PROCEEDING

Petitioner is Cameron Frazier, plaintiff-appellee below, who sues through his mother and next friend, Christine Frazier.

Respondents are the Commissioner, Florida Department of Education, and the individual members of the State Board of Education, named solely in their official capacities. The current individuals holding those positions are: Dr. Eric J. Smith, Commissioner, Florida Department of Education; T. Willard Fair, Chairman, State Board of Education; Peter Boulware, Dr. Akshay Desai, Roberto Martinez, Phoebe Raulerson, Kathleen Shanahan, and Linda Taylor, members, State Board of Education.[1] They are collectively referred to as "the State" or "State defendants."

Cynthia Alexandre, a teacher at Boynton Beach Community High School, Richard Poorman, an assistant principal at Boynton Beach Community High School, and the Palm Beach County, Florida, School Board were named defendants in the district court and were collectively referred to as the "School defendants." None of the School defendants appealed the district court's decision and hence were not

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[1] The Commissioner and several members of the State Board of Education have changed since the filing of this action in 2005. Pursuant to Fed.R.Civ.P. 25(d), the individuals currently holding those positions are automatically substituted as parties in their official capacities.

parties in the Eleventh Circuit and are not parties in this Court.[2]

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[2] Counsel for Poorman and the Palm Beach County School Board entered a limited appearance at the Eleventh Circuit for the sole purpose of obtaining copies of all briefs, orders, and other pleadings. Consistent with that appearance, Petitioner serves them with a copy of this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The order of the court of appeals denying *en banc* review, with dissent, reprinted in the Appendix to the Petition ("App.") at 1a-19a, is reported as *Frazier v. Alexandre*, 555 F.3d 1292 (11th Cir. 2009). The panel opinion (App. 20a-32a) is reported as *Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008).

The district court's opinion granting summary judgment to Frazier against the School defendants and denying the State's motion to dismiss (App. 38a-76a) is reported as *Frazier v. Alexandre*, 434 F.Supp.2d 1350 (S.D. Fla. 2006).

The district court's consent order (App. 77a-86a), order granting summary judgment to Frazier against the State defendants (App. 35a-37a) and final judgment (App. 33a-34a) are unpublished.

JURISDICTION

The court of appeals issued its decision on July 23, 2008, and denied the petition for rehearing *en banc* on January 26, 2009. App. at 20a, 1a. This petition has been filed within 90 days of the denial of rehearing *en banc*.

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Fla. Stat. § 1003.44(1) provides:

> Each district school board may adopt rules to require, in all of the schools of the district, programs of a patriotic nature to encourage greater respect for the government of the United States and its national anthem and flag, subject always to other existing pertinent laws of the United States or of the state. When the national anthem is played, students and all civilians shall stand at attention, men removing the headdress, except when such headdress is worn for religious purposes. The pledge of allegiance to the flag, "I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all," shall be rendered by students standing with the right hand over the heart. The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state. Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge. Upon written request by his or her parent, the student must be excused from reciting the pledge. When the pledge is given, civilians must show full respect to the flag by standing at attention, men removing the headdress, except when such headdress is worn for religious purposes, as provided by Pub. L. ch. 77-435, s. 7, approved June 22, 1942, 56 Stat. 377, as amended by Pub.

L. ch. 77-806, 56 Stat. 1074, approved December 22, 1942.

STATEMENT OF THE CASE

1. Cameron Frazier, then in 11th grade in a public high school, was singled out, humiliated in front of his classmates, and removed from class for remaining quietly seated during the pledge of allegiance because of his personal beliefs and convictions.[3] App. at 42a-44a. Palm Beach County

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[3] It is undisputed that Frazier's behavior in the classroom was non-disruptive. Nonetheless, after quietly expressing his principled decision to remain seated, he was publicly berated by his classroom teacher:

> "[O]h you wanna bet? See your desk? Now look at mine. Big desk, little desk. You obviously don't know your place in this classroom." Frazier responded: "I thought this was a classroom. Why must you insist on taking this so far?" Alexandre then said: "I will take this as far as I need to. I will fight this to the top." Frazier responded: "I'm sorry, I do not stand for the flag."
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> * * *
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> Alexandre then handed Frazier a document with the Palm Beach County School District's logo on it and told Frazier: "Read this. Florida state statutes say you may choose not to say the pledge ONLY by written request by your parent AND you still must stand!" ... [Frazier] reiterated that he did not stand for the pledge of allegiance. Alexandre then said: "You clearly have no respect! You are so ungrateful and so un-American. Do you know what's out there fighting our war? That flag you refuse to show

(continued)

School Board custom or practice, predicated on Fla. Stat. § 1003.44(1), required Frazier to have parental consent before he could be excused from reciting the pledge; even with consent, he would be required to stand during the pledge. App. at 48a.

2. Frazier sued claiming that those portions of Fla. Stat. § 1003.44(1), and the Palm Beach County School Board custom or practice implementing it, that require a student to obtain a parent's permission before being excused from reciting the pledge of allegiance, and further require a student to stand during the pledge even if excused from reciting it personally, are unconstitutional on their face and as applied to Frazier, in violation of his First and

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> respect to." Frazier replied "no, our soldiers are out fighting a war. The flag is an inanimate piece of cloth that doesn't move and surely can't hold a gun." Alexandre said "You are so ridiculous! I can't believe you are so disrespectful!" Frazier tried to respond, saying "I choose not to say the ..." but was interrupted by Alexandre who said "No! You're out of here. I'm so sick of you!" She called the principal's office and requested that Frazier be removed from the class. She then crossed her arms and stared at Frazier.

App. 42a-43a (emphasis in original). Frazier was then removed from the classroom by an assistant principal, another school administrator and a school police officer, taken to the principal's office and kept there for the rest of the class period. *Id.* at 43a-44a. The assistant principal instructed Frazier to have his mother sign a consent form to be excused from reciting the pledge and further instructed Frazier that he would still have to stand during the pledge. *Id.* at 44a.

Fourteenth Amendment rights. App. at 39a-42a, 45a-47a. "Frazier does not challenge the daily recital of the pledge in Florida's classrooms. Nor does he challenge the content of the pledge. He challenges only the authority of the State to override *his* conscience and compel *his* participation in such exercise." *Id.* at 63a (emphasis in original).

Frazier and the School defendants quickly agreed that there was no dispute of fact and that the claims could be resolved as a matter of law. A consent order (App. 77a-86a) was entered by the district court stating that "the School Defendants stipulate to the facts plead in the First Amended Complaint and agree that the case may be resolved by a motion for judgment on the pleadings pursuant to Rule 12(c), ... without the need for an answer to be filed."[4] App. at 48a. They further agreed "that the constitutionality of Fla. Stat. § 1003.44(1) is dispositive of Frazier's

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[4] The motion was ultimately treated as a Fed.R.Civ.P. 56 motion for summary judgment. *Id.*

In addition to stipulating to the facts plead in the First Amended Complaint, the School defendants stipulated, in the consent order, that it was their custom or practice to require parental consent prior to students being excused from reciting the pledge and that even if students were excused, they would be required to stand at attention during the pledge. They further stipulated that their customs or practices are sufficient to subject the School Board to liability under *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). App. at 48a. Although all of the stipulations were filed separately (Doc. 33), the district court set them out in its order granting summary judgment to Frazier against the School defendants and denying the State's motion to dismiss, App. at 39a-48a.

claims: if the statute is unconstitutional, the District's customs and practices based thereon are unconstitutional as well." App. at 48a.

The State defendants, who were not parties to the consent order, moved to dismiss Frazier's claims against them. *Id.* Their motion acknowledged this Court's holding in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), that the state may not compel students to recite the pledge in violation of their conscience. But, they contended, this right belongs to the parents, not the students, and that *Barnette* was silent on that matter because the parental interests were aligned with the students' interests, despite *Barnette*'s emphasis upon the right of individual conscience.[5]

The district court considered, and rejected, the State's argument. App. at 61a-73a. It recognized "that parents have a fundamental right to control the upbringing of their children." *Id.* at 72a-73a (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), *Troxel v. Granville*, 530 U.S. 57, 66 (2000), *Meyer v. State of Nebraska*, 262 U.S. 390, 400 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972)). But the existence of that right, the court held, did not support the State's position:

> [T]his right does not translate into

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[5] School defendants Poorman and School Board did not file a brief. Alexandre adopted "the State's arguments in favor of dismissal as her own." App. at 39a.

> a requirement that a parent must give prior approval of a child's exercise of First Amendment rights in a school setting. Were such the case, all the previously cited pledge cases would have so held, as the recognition of parental rights in the educational sphere predated *Barnette* by decades. "Pledge autonomy" has been the state of the law for over 60 years; it is the State Defendants who attempt to create a new rule of constitutional law by requiring prior parental approval of the exercise of First Amendment rights in a school setting.

App. at 73a. Hence, the district court held that Florida's statute "to the extent that it requires a student to obtain a parent's permission to be excused from reciting the pledge of allegiance and requires a student to stand during the pledge of allegiance, is unconstitutional on its face and as applied to Frazier in violation of his First and Fourteenth Amendment rights." *Id.* It awarded Frazier relief against the School defendants.[6] *Id.* at 74a-75a.

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[6] The relief awarded by the district court against the School defendants had been agreed to in the consent order and included injunctive relief, a change in School District policies, communication of the change to District employees, disciplinary action against the teacher, and the payment of attorneys' fees, costs and damages in the amount of $32,500. App. at 82a-84a. Because the agreed upon relief was contingent upon a determination that Florida's statute is unconstitutional on it

(continued ..)

With the State's motion to dismiss being denied, and summary judgment entered against the School defendants, Frazier and the State defendants agreed that the remainder of the case could similarly be resolved by summary judgment without further briefing. The district court subsequently granted summary judgment for Frazier on his claims against the State defendants,[7] App. at 35a-37a, and entered a final judgment, *id.* at 33a-34a.

3. The State defendants appealed to the Eleventh Circuit, which issued its decision on July 23, 2008, affirming in part and reversing in part the district court's judgment.[8] App. 20a-32a.

(.. continued)
face and as applied to Frazier, *id.* at 82a, and because the district court's finding of facial invalidity was set aside by the Eleventh Circuit, Frazier has not obtained the relief outlined in the consent order.

[7] Like the School defendants, the State defendants negotiated the relief to be afforded Frazier should he finally prevail on his claims. *See* summary judgment order, App. at 36a-37a.

[8] The panel's assertion that "[t]he as-applied claims did not involve the State and were resolved by consent order" is incorrect. App. at 22a, n. 1. Those claims were opposed by the State defendants in the district court and adjudicated by that court's combined summary judgment order against the School defendants and denial of the State defendants' motion to dismiss. *Id.* at 54a, 61a, 73a. The State defendants only challenged the finding of facial invalidity of the statute upon appeal to the Eleventh Circuit.

Because the consent order required both a finding of unconstitutionality as-applied to Frazier and facial invalidity, App. at 82a, the Eleventh Circuit's reversal as to the facial
(continued ...)

The panel first rejected the State's assertion that students who are excused by their parents from reciting the pledge are not required to remain standing, declared that the requirement was facially unconstitutional, determined that the requirement was severable from the remainder of the statute, and affirmed the district court on this facial challenge.[9] App. at 24a-27a.

However, the panel accepted the State's claim that Florida's statute vindicates parental rights and was not facially unconstitutional to the extent that it required parental consent before a student could be excused from reciting the pledge. App. at 27a-32a. The panel thus rejected Frazier's claim that the Florida statute was facially invalid as to the parental consent requirement. *Id.* at 32a. The panel left application of the statute "to a specific student or a specific division of students" to be decided on an as-applied, case-by-case basis. *Id.*

4. Frazier then filed a petition for rehearing *en banc*, which was denied. App. at 2a. Judge Barkett dissented from the denial, stating:

> An en banc rehearing is warranted because the panel's holding that the State of Florida can compel students to recite the Pledge of

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(... continued)
validity of the statute eliminated the precondition upon which the consent order was based and thus the School defendants are no longer bound by its terms.

[9] Frazier does not challenge this portion of the panel's decision.

> Allegiance in violation of their personal beliefs directly contravenes precedent that has been firmly entrenched for over 65 years, since *Barnette* held that the State does not have the power to compel minor students to recite the Pledge to the flag.

App. at 3a. As she further explained, "[t]he Florida statute at issue would compel the very same students in *Barnette* to first obtain permission to do that which the Supreme Court has already explicitly ruled they have a constitutional right to do." *Id.* at 7a.

Judge Barkette rejected the notion that there was an independent parental right that was in conflict with the student's established First Amendment right not to recite the pledge of allegiance and criticized the panel for not applying a strict scrutiny standard to the statute's infringement upon an established, fundamental Constitutional right. App. at 3a. Moreover, she noted, even if an overbreadth analysis was appropriate under the circumstances presented by this case, "the statute is *still facially unconstitutional*. A statute that compels speech violative of an individual's conscience and that reaches millions of Florida public school students (including 798,091 Florida high-schoolers) surely infringes on a 'substantial amount of protected speech.'" *Id.* at 11a, n. 9 (emphasis in original).

In response to the panel's interpretation of Florida's statute as a parental rights case, she wrote: "[t]he right to exercise one's conscience in not reciting the Pledge lies solely with the individual student, not

with the parents of that student and certainly not with the State. This is no less true today than it was in 1943 ... ." App. at 18a. That is because "[t]he parental right of upbringing is not a positive right that gives parents the power to *invoke* the aid of the State against a minor's exercise of constitutional rights but a negative right that provides for protection of that right *against the State.*" *Id.* at 16a (emphasis in original). Finally, she concluded, "this statute in its operation delegates a right to the parent that the State constitutionally cannot itself possess. The State cannot give what it does not have." *Id.* at 13a.

The decision below leaves Frazier, and every other student within the Eleventh Circuit, with the prospect of litigating, on a case by case basis, "the balance of parental, student, and school rights," App. at 31a, to determine whether *any* individual student may exercise an established Constitutional right without the express written consent of his or her parent.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT DECISION SQUARELY CONTRADICTS THIS COURT'S HOLDING IN *WEST VIRGINIA STATE BOARD OF EDUCATION V. BARNETTE*.

It has long been clearly established law that public school students cannot be compelled to recite the pledge of allegiance:

> If there is any fixed star in our

> constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Barnette, 319 U.S. 624, 640-42 (1943) (footnote and citations omitted).

By enacting Fla. Stat. § 1003.44(1), the Florida legislature has created an exception to *Barnette*'s rule: no Florida student may be excused from standing and reciting the pledge of allegiance each day without written permission from his or her parent. Even if a student is excused from reciting the pledge, the statute requires the student to remain standing.[10] The Florida statute thus undermines the right of individual conscience that *Barnette* enshrined as a bedrock principle of First Amendment law.

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[10] The parties, district court, and Eleventh Circuit all agreed that the statute requires parental consent before a student can be excused from reciting the pledge of allegiance. App. at 22a-24a. Both the district court and the Eleventh Circuit rejected the State's assertion that the standing requirement is waived if a student has been excused. *Id.* at 24a-25a. Thus, the lower courts read Florida's statutory requirement in this manner.

The Eleventh Circuit affirmed the district court's determination that the requirement that students stand at attention during the pledge, even if excused from reciting the pledge, was facially unconstitutional. App. at 24a-27a. Thus, only the parental consent requirement is before this Court.

A. This Court And Lower Courts Have Consistently Understood The Holding In *Barnette* As A Constitutional Limitation Of The State's Power To Compel Students To Recite The Pledge Of Allegiance.

Until the panel's decision, it was clearly established law that students could not be punished for sitting quietly during the pledge of allegiance. This Court and lower courts had consistently held that the state may not constitutionally compel students to recite the pledge of allegiance against their conscience. *See Barnette*, 319 U.S. 624 (1943). *See also*: *Elk Grove v. Newdow*, 542 U.S. 1, 8 (2004) ("Consistent with our case law, the school district permits students who object on religious grounds to abstain from the recitation.") (citing *Barnette*, 319 U.S. at 624); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Myers v. Loudon County Public Schools*, 418 F.3d 395 (4th Cir. 2005) (statute that clearly exempts students from reciting the pledge of allegiance and does not compel students to stand during the pledge is constitutional); *Circle School v. Phillips*, 381 F.3d 172 (3rd Cir. 2004) (striking down state statute that required parental notification when a student refused to recite the pledge of allegiance or to salute the flag); *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004) (clearly established law that a student may not be punished for his refusal to recite the pledge nor for engaging in protest during the pledge by silently raising his fist in

the air); *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 417 (3rd Cir. 2003) ("For over fifty years, the law has protected elementary students' rights to refrain from reciting the pledge of allegiance to our flag. Punishing a child for non-disruptively expressing her opposition to recitation of the pledge would seem to be as offensive to the First Amendment as requiring its oration.") (citation omitted); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992) (holding that a school may have its classes recite the pledge so long as it does not compel pupils to espouse its content); *Lipp v. Morris*, 579 F.2d 834 (3rd Cir. 1978) (declaring a New Jersey statute requiring students "to show full respect to the flag while the pledge is being given merely by standing at attention" unconstitutional); *Goetz v. Ansell*, 477 F.2d 636, 637-38 (2d Cir. 1973) (holding that a student has the right to remain quietly seated during the pledge); *Banks v. Bd. of Public Instr.*, 314 F.Supp. 285 (S.D. Fla.1970), *vacated by* 401 U.S. 988 (1971), *reinstated without published opinion by dist. ct. and aff'd*, 450 F.2d 1103 (5th Cir. 1971) (same); *Rabideau v. Beekmantown Central School District*, 89 F.Supp.2d 263, 267 (N.D. N.Y. 2000) ("It is well established that a school may not require its students to stand for or recite the Pledge of Allegiance or punish any student for his/her failure to do so."); *Frain v. Baron*, 307 F.Supp. 27 (E.D. N.Y. 1969)(school enjoined from "excluding [students] from their classrooms during the Pledge of Allegiance, or from treating any student who refuses for reasons of conscience to participate in the Pledge in any different way from those who participate."); *Holden v.*

Board of Ed. of City of Elizabeth, 216 A.2d 387 (N.J. 1966)(Black Muslim children could not be punished for refusing to pledge allegiance to the flag); *Sheldon v. Fannin*, 221 F.Supp. 766 (D. Ariz. 1963)(students cannot be punished for refusing to stand during the National Anthem).

Written in the midst of World War II, *Barnette* powerfully recognized the constitutional right of individual conscience and the threat to that right created by compelled political speech. In *Barnette*, and here, it is the student who is being compelled to speak. Thus, in *Barnette*, as here, it is inescapably the student's right of individual conscience that is centrally imperiled by a mandatory requirement to recite the pledge of allegiance. Consistent with that view, the Court's description of the challenged regulation in *Barnette* focused exclusively on the student: "It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning." 319 U.S. at 633. Likewise, the *Barnette* Court focused on the rights of the student when explaining why the discretionary authority of school officials did not include the right to compel students to recite the pledge. As Justice Jackson explained:

> [School officials] have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits

> of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

319 U.S. at 637.

In the decades since *Barnette*, this Court has frequently reaffirmed, in a variety of settings, that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In Re Gault*, 387 U.S. 1, 13 (1967). *See also*: *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors ... are protected by the Constitution."); *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (plurality) ("A child, merely on account of his minority, is not beyond the protection of the Constitution.").

In *Tinker*, for example, the Court emphasized that students have independent rights of expression and conscience:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights

> which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

393 U.S. at 511. At no point in *Tinker* did the Court suggest that Mary Beth Tinker's right to wear a black armband to school depended on whether her parents approved of her silent protest against the Vietnam War.

By contrast, the Eleventh Circuit's decision sweeps aside decades of established law by viewing Florida's requirement that a student must first obtain parental permission before declining to participate in the pledge "as largely a parental-rights statute." App. at 29a. Reading Florida's pledge statute as a "parental rights" statute strips students of established constitutional rights, transforms them into a mere vessel of parental will, and makes them constitutional bystanders. This should not be the law, and indeed has not been the law for decades.

B. The Panel's Treatment Of This Case As A Case About Parental Rights Is Fundamentally Misplaced.

The Eleventh Circuit's citation to *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), for the proposition that there is a parental interest at stake in a student's decision whether to participate in the pledge is seriously misplaced. *See* App. at 29a-30a.

Glucksberg held constitutional a state statute banning assisted suicide; it had nothing to do with parental rights. The panel extracted its quotation of the right "to direct the education and upbringing of one's children" from a string of cases identifying various liberty interests protected by the Due Process Clause. 521 U.S. at 719-20. *Glucksberg* notes that among those interests, the Due Process Clause limits the power of the state to interfere with parental rights, citing two cases: *Meyer v. Nebraska*, 262 U.S. 390 (1923) (statute prohibiting foreign language instruction to children unreasonably infringed upon the liberty interests of the teacher and parents), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (criminal penalties for a parent to fail to send child to a public school unconstitutionally interferes with parental right to control upbringing). The Eleventh Circuit also cites *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which, relying on *Meyer* and *Pierce*, held that criminal penalties applied to Amish parents who only sent their children to school through the eighth grade violated the parents' right to determine the upbringing of their children.

These cases do no more than establish the

liberty interests of parents with regard to their children's education where state laws collided with and directly obstructed their constitutionally protected interests. None of these cases involving education empowered the state to act for parents in overriding their children's fundamental constitutional rights. And, these principles were well established at the time *Barnette* and *Tinker* were decided. *See, e.g.*, *Tinker*, 393 U.S. at 506 (that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate ... has been the unmistakable holding of this Court for almost 50 years."). As pointed out by Judge Barkett in her dissent:

> The panel asserts that the State's "vindication" of the parental "right of upbringing" can serve as a justification for the State's passage of this statute. This claim seriously misunderstands the nature of that right. The parental right of upbringing is not a positive right that gives parents the power to *invoke* the aid of the State against a minor's exercise of constitutional rights, but a negative right that provides for protection of the right *against the State*.
>
> * * *
>
> Every case that has ever discussed the issue of "parental upbringing" dealt with the conflict between a parent's right and *a State's* attempted curtailment of that right, not

> a conflict between parent and child.

App. at 16a (footnote omitted) (emphasis in original). Indeed, where the parent's view may collide with the student's choice regarding the pledge, it is the student's constitutional interest that is protected. *See, e.g., Elk Grove v. Newdow*:

> [T]he interests of this parent and this child are not parallel and, indeed, are potentially in conflict.[FN7]
>
> [FN7] ... [The mother] tells us that her daughter has no objection to the Pledge, and we are mindful in cases such as this that "children themselves have constitutionally protectible interests." In a fundamental respect, "[i]t is the future of the student, not the future of the parents," that is at stake.

542 U.S. at 15 & n. 7 (citations omitted).

Parents, of course, have a right to instruct their children in matters of patriotism just as they have a right to instruct their children in matters of religion and conscience. And parents have a variety of means available to them to convey their belief system to their children – in positive as well as negative ways: modeling the values that parents want to inculcate, instructing, cajoling, enticing, punishing, granting or withholding privileges, etc. Parents also

have the well established right to choose a private or public school that offers a course of instruction which most parallels the parents' desires. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

But, until the Eleventh Circuit's decision in this case, parents could not direct the state to compel children to pledge allegiance, or refrain from pledging allegiance, in conformance with the parents' wishes.[11]

Barnette makes it clear that the state cannot compel students to recite the pledge of allegiance. Requiring students to do so under a claim of vindicating parental rights does not cure the unconstitutional nature of the requirement. In short, the state cannot do indirectly (under the guise of parental rights) what it cannot do itself directly.

As this Court said sixty-five years ago, the First Amendment bars the state from prescribing for students, as well as adults, "what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. The Eleventh Circuit ignores decades of decisions

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[11] Florida's statute burdens the exercise of an established First Amendment right in three distinct ways. First, it requires a student with a consenting parent to obtain written consent before the student may exercise his or her constitutional right. Second, it cedes power to the State to compel a student to express a belief that the student does not hold when the student's parent does not consent. Third, it requires the State to prevent a student from pledging allegiance when a parent has requested that the student be excused.

outlining the parameters of students' Constitutional rights and directly conflicts with this Court's established precedent.

C. The Eleventh Circuit's Suggestion That The Obligation Of School Officials To Recognize The Rights Established By *Barnette* Depends Upon Case-By-Case Adjudication Is Both Inconsistent With *Barnette* And Impractical.

Not only does the Eleventh Circuit contradict well-settled law, it leaves many unanswered questions about how Fla. Stat. § 1003.44(1) will be applied in the future. In particular, after upholding the parental consent requirement as facially constitutional despite *Barnette*, the decision below concludes with the caveat that it "decide[s] and hint[s] at nothing about the Pledge Statute's constitutionality as applied to a specific student or a specific division of students." App. at 32a. This reservation presumably leaves it to the district courts, in this and subsequent cases, to determine the statute's constitutionality on an as-applied, case-by-case basis.

The Eleventh Circuit's decision, however, provides no guidance to the district courts as to what criteria should be applied to determine the "balance of parental, student, and school rights" in applying the statute's parental consent requirement. App. at 31a. Can it be that two students, sitting side by side in a classroom, can sit quietly during the pledge of allegiance (without parental permission) and that it would be unconstitutional to punish one because she is "a mature high school student" while the other

could be constitutionally punished because he is immature? Would it require an inquiry into the sincerity of the student's or the parent's beliefs? An evaluation of the student's level of maturity? What criteria are to be applied? What is sufficient maturity for a student to be able to decide for himself?[12]

The panel's decision invites litigation every time a teacher in Florida attempts to apply the statute to a student. *Barnette* foreclosed this case-by-case approach: "It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty." 319 U.S. at 634-35. Simply put, *Barnette* held that the State cannot make the pledge a legal duty. *Id.* at 642.

D. The Decision Below Misapplied This Court's Rules On Substantial Overbreadth.

Although Florida's statute is unconstitutional in every conceivable application,[13] even if Fla. Stat. § 1003.44(1) is only unconstitutional as applied to high

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[12] By specifically holding that its decision says nothing about Frazier's constitutional rights (App. at 23a, n. 2), the Eleventh Circuit holds open the prospect that even his rights may not have been violated. There is scant evidence in the record to conduct a "balance of parental, student, and school rights" in this case. *Id.* at 31a. Unless this Court provides the guidance that the Eleventh Circuit did not, these unresolved issues will have to be sorted out by the district court in the first instance upon remand.

[13] *See Barnette*, 319 U.S. at 642: "If there are any circumstances which permit an exception, they do not now occur to us."

school students, like Petitioner, the Eleventh Circuit erred in holding that the statute was not substantially overbroad and thus facially invalid on those grounds alone.

Assuming, *arguendo*, that the Florida legislature *could* enact a statute that can be constitutionally applied to *some* students, the current statute is substantially overbroad "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The statute reaches millions of Florida public school students, including 798,091 high school students. *See* App. at 11a, n. 9. As Judge Barkett noted, those numbers are clearly "substantial," whether judged in absolute terms or as a percentage of Florida's public school population – high school students represent thirty percent of the total number of students.[14]

Even if Florida's parental consent requirement could be applied to children below a certain age, Florida's legislature has made no attempt to narrow the statute's application – it applies to every "public elementary, middle, and high school in the state." Fla. Stat. § 1003.44(1). An Eleventh Circuit panel cannot sit as a council of revision to rewrite the statute to achieve that end. *U.S. v. Rutherford*, 442 U.S. 544, 555 (1979).

Florida's pledge statute, if not unconstitutional in every conceivable application, is substantially

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[14] *See* http://www.fldoe.org/eias/eiaspubs/pdf/pk-12mbrship.pdf (last visited April 20, 2009).

overbroad and thus facially invalid to the extent that it requires parental consent to be excused from reciting the pledge.

II. THE ELEVENTH CIRCUIT DECISION CREATES A CONFLICT BETWEEN THE CIRCUITS ON THE QUESTION PRESENTED.

The Eleventh Circuit has created a conflict among the circuits where none previously existed.[15]

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[15] Texas and Utah have similar statutory requirements regarding a student's participation in the pledge of allegiance. *See*: Tex. Education Code Ann. § 25.082(c) ("On written request from a student's parent or guardian, a school district shall excuse the student from reciting a pledge of allegiance [to either the United States flag or the Texas flag]"); Utah Code Ann. § 53A-13.101.6(3)(b) ("Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge.") and (3)(c) ("A student shall be excused from reciting the pledge upon written request from the student's parent or legal guardian."). There is no reported state or federal decision regarding Utah's statutory requirements.

A Texas district court appears, without analysis, to have accepted a parental consent requirement to be excused from reciting the pledge (U.S. or Texas) as being permitted by *Barnette*. *See Croft v. Perry*, --- F.Supp.2d ----, 2009 WL 804112 at *8 (N.D. Tex., March 26, 2009) (commenting that the "opt-out" provision – parental consent – eliminated any coercion, "and the state legislature appears to have considered and followed Supreme Court precedent on this point."). The challenge in *Croft* did not involve the parental consent requirement. Rather, the challenge was an Establishment Clause claim based upon the recent inclusion of "under God" to the Texas pledge.

The panel's opinion directly conflicts with a Third Circuit case and deviates from every other reported circuit decision regarding students and the pledge of allegiance.

In *Circle School v. Phillips*, the court considered a Pennsylvania statute that required, *inter alia*, "the recitation of the Pledge of Allegiance or the national anthem at the beginning of each school day." 381 F.3d at 174. While the statute gave "students the option of refraining from participating in the recitation and saluting the national flag on religious or personal grounds," it required "school supervising officials to notify, in writing, parents or guardians of those students who have declined to join in the recitation or salute the flag." *Id.* The Third Circuit squarely held "that the parental notification provision of the Act violates the school students' First Amendment right to free speech and is therefore unconstitutional." *Id. A fortiori*, a parental consent requirement would be held unconstitutional by the Third Circuit.

There (as here), the state argued that the statute represented "a proper balance between the students' right to freedom of speech and the Commonwealth's (and some parents') interest in the proper instruction of patriotic and civic values in all schools ... ." *Id.* at 178. Relying on *Barnette*, the Third Circuit firmly rejected Pennsylvania's approach. 381 F.3d at 179-80.

In striking down Pennsylvania's statute as facially unconstitutional, the Third Circuit concluded that the parental notification requirement was

viewpoint discriminatory and subject to a strict scrutiny analysis:

> Pennsylvania's parental notification clause clearly discriminates among students based on the viewpoints they express; it is "only triggered when a student exercises his or her First Amendment right not to speak." A student's decision to recite the Pledge of Allegiance or the national anthem, and thereby adopt the specific expressive messages symbolized by such an act, does not trigger parental notification. On the other hand, a student's refusal to engage in the required recitation leads to a written notice to his or her parents or guardian, and possibly parental sanctions.

Circle Schools v. Pappert, 381 F.3d at 180 (citation omitted). The court concluded that Pennsylvania did not have a compelling state interest to justify the significant interference with students' First Amendment rights and held that the statute "unconstitutionally treads on students' First Amendment rights." *Id.* at 181.

Florida's statute operates in the same manner. Parental consent is only triggered when a student seeks to exercise his or her First Amendment right not to speak. The panel recognized that the statute was not viewpoint neutral but dismissed the concern:

> We suppose that the statute is not

> entirely neutral; the statute seems to start with the proposition that parents generally do not object to their student children reciting the Pledge. We accept (and no one in this case has contended otherwise) that the elected Florida legislature probably does know about what parents in the state of Florida generally would prefer.

App. at 30a, n. 6. This deference to a presumed legislative decision as to what the majority of parents would want runs afoul of established law on two counts. First, it cedes the exercise of a First Amendment right to the majority. *Barnette* rejected that notion with regard to the pledge:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

319 U.S. at 638. Second, it gives credence to what the panel presumes to be motivation on the legislature's part to enact the preference of Florida's parents. This too has been rejected by this Court. *See Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 677

(1994) ("[B]enign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications.").

Florida's statute, like Pennsylvania's statute, discriminates on the basis of viewpoint and cannot withstand a strict scrutiny analysis. No other circuit, when looking at pledge statutes, has engaged in a balancing of students' versus parents' interests. *See* pledge cases cited *supra* at pp. 13-14. The panel's failure to even begin to identify and evaluate the interests at stake in this litigation, much less apply a strict scrutiny analysis, falls far afield from established jurisprudence and warrants review by this Court. The panel's decision takes parental rights, traditionally utilized as a shield against state interference, and transforms it into a state sponsored sword to be wielded by a parent to compel a student's adherence to parental beliefs.

The Third Circuit reached the opposite conclusion on the same question. This Court should grant certiorari to resolve that conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Randall C. Marshall
Counsel of Record
ACLU Foundation of
Florida, Inc.
4500 Biscayne Boulevard,
Suite 340
Miami, FL 33137-3227
(786) 363-2700
(786) 363-1108 (facsimile)

James K. Green, Esq.
JAMES K. GREEN, P.A.
Suite 1650, Esperante'
222 Lakeview Ave.
West Palm Beach, FL 33401
(561) 659-2029

Cooperating Attorney for
the American Civil
Liberties Union Foundation
of Florida, Inc.

Attorneys for Cameron
Frazier

Dated: April 23, 2009

APPENDIX

[PUBLISH]

FILED
U.S. COURT OF
APPEALS
ELEVENTH
CIRCUIT
JAN 26, 2009
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14462

D. C. Docket No. 05-81142-CV-KLR

CAMERON FRAZIER,
through his mother
and next friend, Christine Frazier,

Plaintiff-Appellee,

versus

CYNTHIA ALEXANDRE,
individually, et al.,

Defendants,

JOHN WINN,
in his official capacity as
Commissioner of the Florida Department of
Education,

F. PHILIP HANDY,
in his official capacity as
Chairman of the Florida State Board of Education,
DONNA CALLAWAY,
T. WILLARD FAIR,
ROBERTO MARTINEZ,
PHOEBE RAULERSON,
LINDA TAYLOR,
KATHLEEN SHANAHAN,
in their official capacities as
members of the Florida State Board of Education,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON and PRYOR, Circuit Judges.

O R D E R:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition for Rehearing En Banc is DENIED.

/s/ J L EDMONDSON
CHIEF JUDGE

BARKETT, Circuit Judge, dissenting from the denial of rehearing en banc:

An en banc rehearing is warranted because the panel's holding that the State of Florida can compel students to recite the Pledge of Allegiance in violation of their personal beliefs directly contravenes precedent that has been firmly entrenched for over 65 years, since *West Virginia State Board of Education v. Barnette* held that the State does not have the power to compel minor students to recite the Pledge to the flag. 319 U.S. 624 (1943).

The panel opinion finds facially constitutional a Florida statute that compels all students, including this 17-year-old plaintiff, to recite the Pledge unless they obtain written parental consent to exercise their First Amendment rights.[1] The panel opinion ignores Barnette and fails to apply the strict scrutiny required when this most fundamental of rights is being violated by the State. Such a "permission" requirement is patently unconstitutional and this opinion puts us at

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[1] The pertinent part of Florida Statute § 1003.44(1) reads: The pledge of allegiance to the flag . . . shall be rendered by students standing with the right hand over the heart. The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state. Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge. Upon written request by his or her parent, the student must be excused from reciting the pledge.

odds not only with direct Supreme Court precedent but with the decisions of other circuits addressing similar statutes.[2]

To avoid the dictates of *Barnette*, the panel mischaracterizes the issue as one involving the resolution of conflicting constitutional rights between parents and children. This recharacterization is wholly unpersuasive, as it is undisputed that no such conflict exists in this case. It is also extremely unlikely that some hypothetical case would emerge where a minor student might sue the State through a non-parental next friend after his parents refused him permission to remain silent; in essence, such parents would be demanding that the State force their child to violate his conscience.

In addition to its failure to apply strict scrutiny, the panel opinion completely disregards other established constitutional principles. Notwithstanding that it is beyond peradventure that minors have constitutional rights, the panel opinion fails to consider them, much less to weigh them. Compounding this

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[2] *See Circle Schools v. Pappert*, 381 F.3d 172 (3d Cir. 2004) (applying strict scrutiny to, and holding unconstitutional, a requirement that a parent must be notified if a child chooses not to say the pledge); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992) (holding that a school may have its classes recite the Pledge so long as it does not compel pupils to espouse its content); *Goetz v. Ansell*, 477 F.2d 636, 637–38 (2d Cir. 1973) (holding that a student has the right to remain quietly seated during the Pledge). *See also Elk Grove v. Newdow*, 542 U.S. 1, 8 (2004) ("Consistent with our case law, the school district permits students who object on religious grounds to abstain from the recitation.") (citing to *Barnette*, 319 U.S. at 624).

error, the panel overlooks the fact that the State cannot do indirectly what it cannot do directly. Because the State itself cannot compel speech, it lacks the capacity to delegate to parents the power to compel this speech. In trying to justify the State's impermissible delegation of power, the panel further errs when it claims that a parent's "fundamental right of upbringing" is even implicated, much less permits the State's action.[3]

In light of the fundamental nature of the student right at issue and the absence of any "countervailing" parental right, it is not surprising that no court has ever required parents to consent to a minor's exercise of his or her constitutional rights of conscience. Students possess basic rights of belief and expression under the First Amendment independent of their parents, and the panel has, without any supportable legal reason, wrongfully deprived students of those rights. These concerns are more fully discussed below.

I. Supreme Court Precedent Dictates that Students Cannot Be Compelled to Recite the Pledge of Allegiance

In *Barnette*, the West Virginia Board of Education passed a resolution requiring students to salute the flag and recite the Pledge of Allegiance at

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[3] In the absence of any support for a parent's "right" to prohibit a minor's exercise of his or her freedom of speech, belief and conscience - and therefore no anchor with which the panel can legitimately ground its "parent-child" interpretation of the Pledge statute - it becomes even more untenable to argue that Barnette is inapplicable.

school. The Supreme Court recognized that this compulsion infringed on the *students'* rights of conscience, and thus, found the law unconstitutional. There is no distinction between the rights of students in West Virginia schools and the rights of students in Florida schools.[4]

The *Barnette* Court acknowledged the obvious fact that "[the] Pledge requires affirmation of a belief and an attitude of mind." *Id.* at 633. The Court then recognized that to permit the State to compel the Pledge would require a complete abdication of the First Amendment. To sustain the State's position, the Court would be "required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *Id.* at 634. This position would be untenable and the Court emphatically rejected it:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what

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[4] The Court also made clear that, while the case may have been brought by Jehovah's Witnesses, its reach extended beyond any religious objection:

> Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.

Id. at 634-35.

> shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.
>
> We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

Id. at 642. The Florida statute at issue would compel the very same students in *Barnette* to first obtain permission to do that which the Supreme Court has already explicitly ruled they have a constitutional right to do.

The panel opinion's effort to distinguish Barnette and its progeny[5] on the basis that "in those cases, the custodial parent was not opposing the child's choice" whereas here there is a potential conflict between parent and child[6] is unavailing on many levels. First, as noted, there is no conflict in this case as the suit against the State was brought by the student's mother on his behalf. The panel opinion makes no mention of this fact nor addresses its

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[5] *See Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004); *Banks v. Bd. of Pub. Instruction*, 314 F. Supp. 285 (S.D. Fla. 1970), *vacated by* 401 U.S. 988 (1971), *reinstated without published opinion by dist. ct. and aff'd*, 450 F.2d 1103 (5th Cir. 1971).

[6] *Frazier*, 535 F.3d 1279, 1284 (2008)

significance.

Moreover, nothing in the Supreme Court's elucidation of the core free speech principles and rights of the *students* in *Barnette* can be construed to depend on the permission of their parents. But even if that distinction were relevant, we are obligated to deal with such a tension through a balancing analysis of the students' free speech right guaranteed by *Barnette* against whatever purported rights (and their sources) parents may have to compel their children to violate their conscience.[7] This court cannot simply dismiss *Barnette* outright without any consideration of the students' rights.

The panel not only avoids the conclusion directly dictated by the specific precedent of *Barnette* but commits a broader error by failing to mention, much less apply, the strict scrutiny required before the State can be permitted to infringe upon a fundamental right. The panel instead erroneously asserts that the plaintiffs have brought an overbreadth challenge. This doctrine – requiring that the statute prohibit "a substantial amount of protected speech" before it can be deemed facially invalid, *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008) – is inapposite both in application and rationale.[8]

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[7] I do not believe there is any existing authority for such a parental right, as I discuss in greater depth in part III.

[8] The overbreadth doctrine is applied to laws that *curtail* or *prohibit* speech, not laws where the State compels individuals to say things that might contravene their most deeply-held beliefs. The rationale underlying its application is to balance harms, as the Supreme Court recently explained when applying the doctrine

This statute is not prohibiting speech; it is compelling speech against one's conscience. Whether one calls it "the right not to speak" or "liberty of conscience," the freedom to *think* and *hold beliefs* that do not comport with state orthodoxy is a basic part of this nation's foundation; yet this core tenet of our Founding Fathers is rendered hollow if the State can force individuals to espouse that with which they disagree. *See, e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a State nor the Federal Government can . . . force [a person] to profess a belief or disbelief in any religion.");

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in a case that criminalized the solicitation of child pornography:

> The [overbreadth] doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional - particularly a law directed at conduct so antisocial that it has been made criminal - has obvious harmful effects.

Williams, 128 S. Ct. at 1838. The nature of this balancing inherently requires that the speech to be curtailed is somehow detrimental, such as in the dissemination of pornography or the use of "fighting words," which might trigger public disturbances or protesting where a purportedly greater harm might result. Here, it harms no one for an individual to refrain from speaking as a matter of conscience. The result is that by compelling this speech, the State is not simply reducing the flow of ideas but manipulating the marketplace of ideas without a clear legitimate purpose. Such compulsion must be analyzed under the strict scrutiny test.

Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 791 (1988) ("'The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.' To this end, the government, *even with the purest of motives*, may not substitute its judgment as to how best to speak for that of speakers and listeners.") (internal citations omitted) (emphasis added).

This sacred right may be violated, if ever, only for the most compelling of state justifications. For that reason, strict scrutiny has been applied not just in *Barnette* but in cases of speech compulsion generally, and should be applied here. *See Barnette*, 319 U.S. at 639 ("[First Amendment rights] are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."); *Wooley v. Maynard*, 430 U.S. 705, 716 (1977) (asking "whether the State's countervailing *interest is sufficiently compelling* to justify requiring [people] to display the state motto on their license plates" and finding that the state of New Hampshire could not punish individuals who covered up "Live Free or Die" on their license plates because it was repugnant to their moral, political, and religious beliefs) (emphasis added); *Pac. Gas & Elec. Co. v. Pub. Util. Com'n of Cal.*, 475 U.S. 1, 16–17 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say. . . . [T]he government may not impose [its regulations] *absent a compelling interest*.") (emphasis added); *Riley*, 487 U.S. at 796, 798 (stating that the "lodestars in deciding what level of scrutiny to apply to a compelled statement must be the

nature of the speech taken as a whole and the effect of the compelled statement thereon" and applying "exacting First Amendment scrutiny").

The Pledge statute cannot survive a test asking whether the State has a compelling interest to infringe on the rights of conscience because "[the State's interest in disseminating an ideology] cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley*, 430 U.S. at 717. Although some compelling reasons might exist that could support the curtailment of a constitutional right of free speech, there are none in this case: "Neither our domestic tranquility in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation." *Barnette*, 319 U.S. at 644 (Black, J. and Douglas, J. concurring).[9]

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[9] An overbreadth analysis focuses on the *content of the speech*, not the age or characteristics of the speaker. But even if one were able to apply the doctrine by somehow determining which students would experience an unconstitutional burden on speech, the statute is *still facially unconstitutional*. A statute that compels speech violative of an individual's conscience and that reaches millions of Florida public school students (including 798,091 Florida high-schoolers) surely infringes on a "substantial amount of protected speech." *See* http://www.fldoe.org/eias/eiaspubs/pdf/pk-12mbrship.pdf (last visited November 21, 2008).

As even the panel acknowledges, the type of speech the statute covers is *wholly-protected subject matter* as to older students. *Frazier*, 535 F.3d at 1285 ("[T]he balance of parental, student, and school rights might favor the rights of a mature high school

II. The State Cannot Do Indirectly What It Cannot Do Directly

This case is not about whether parents, *on their own*, can require their children to recite the Pledge of Allegiance, but whether *the State* can burden a clear First Amendment right either by requiring consenting parents to give permission before their children may exercise their constitutional rights or by using nonconsenting parents to compel the expression of beliefs that students do not hold. The panel's resolution ignores both minors' established constitutional rights and the State's incapacity to delegate to parents any power to infringe on those rights.

The State is required to respect and uphold the constitutional rights of minors, which cannot be ignored regardless of whether a parent might disagree with the exercise of those rights.[10] The panel opinion

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student in a specific instance . . . ."). Accordingly, the statute must be "overbroad" because it unconstitutionally burdens an entire group of students – in this case, older students. *See, e.g., Riley*, 487 U.S. at 801 ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").

[10] *In Re Gault* established that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." 387 U.S. 1, 13 (1967). The Supreme Court reiterated the principle that minors have independent First Amendment rights in the very context of the school setting:

> Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must

gives lip service to the principle that minors possess constitutional rights, but asserts that those rights are trumped by the parents' wishes. *Frazier*, 535 F.3d at 1285. This is simply not true as the Supreme Court made clear in *Planned Parenthood v. Danforth* when it established that parents cannot infringe on a minor's constitutional privacy right to obtain an abortion. 428 U.S. 52 (1976).

Moreover, this statute in its operation delegates a right to the parent that the State constitutionally cannot itself possess. The State cannot give what it does not have. The *Danforth* Court focused on the State's lack of delegatory power when it struck down the provisions of a state law requiring both spousal consent for an adult and parental consent for a minor before a woman could proceed with an abortion during the first trimester of pregnancy:

> respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 511 (1969). *See also Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (plurality) ("A child, merely on account of his minority, is not beyond the protection of the Constitution."); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.").

> [T]he State may not constitutionally require the consent of the spouse, as is specified under § 3(3) of the Missouri Act, as a condition for abortion during the first 12 weeks of pregnancy. . . . [T]he *State cannot "delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising* during the first trimester of pregnancy." Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.

428 U.S. at 69 (internal citation omitted) (emphasis added). While recognizing the extremely important concerns of a husband in this most difficult of decisions, the Court nonetheless reiterated: "[W]e cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, *when the State itself lacks that right*." *Id.* at 70 (emphasis added). Especially analogous to this case, the *Danforth* Court then applied the same rationale to the *written parental consent* requirement:

> [A] state may not impose a blanket provision requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her

> pregnancy. Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

Id. at 74.

Thus, even when there was a clear conflict between the wishes of the parent and a minor, the Court protected the separate and independent constitutional privacy right of the minor to an abortion and prevented the State from delegating a power it did not have. A minor's right to express an act of conscience is just as worthy of protection as a minor's constitutional right of privacy to obtain an abortion.[11]

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[11] It also bears reemphasizing that this opinion completely ignores the burden placed by the State on the exercise of a clearly established constitutional right when there is no conflict (as in this case). As noted earlier, the statute forces students whose parents are in agreement with their desires to still seek parental permission to exercise a right that *Barnette* has already established they have. Without the consenting parent's written permission, any administrative discipline would be available to sanction non-compliance with this statute, including expulsion from school. The unnecessary burdening of the exercise of this constitutional right is not permissible.

III. A Parent's "Right of Upbringing" Cannot Be Used As Justification For State Involvement

The panel asserts that the State's "vindication" of the parental "right of upbringing" can serve as a justification for the State's passage of this statute.[12] This claim seriously misunderstands the nature of that right. The parental right of upbringing is not a positive right that gives parents the power to *invoke* the aid of the State against a minor's exercise of constitutional rights but a negative right that provides for protection of that right *against the State*. The cases upon which the panel relies in an attempt to establish a positive right are completely inapposite. The panel roots its (mis)conception of this right in the proposition that the due process clause of the Fourteenth Amendment encompasses the right to "direct the education and upbringing of one's children." *Frazier*, 535 F.3d at 1284 (citing to *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). This principle is not disputed; it is just not relevant to the case at hand.

Every case that has ever discussed the issue of "parental upbringing" dealt with the conflict between a parent's right and *a State's* attempted curtailment of that right, not a conflict between parent and child. In the pertinent discussion in *Glucksberg*, to which the

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[12] *See Frazier*, 535 F.3d at 1285 & n.6 ("Although we accept that the government ordinarily may not compel students to participate in the Pledge, e.g., *Barnette*, we also recognize that a parent's right to interfere with the wishes of his child is stronger than a public school official's right to interfere on behalf of the school's own interest. . . . [The State has a] legitimate interest in protecting the rights of all parents on the question of the Pledge.").

panel cites, the Supreme Court was reviewing the scope of the fundamental due process liberty right, including the parental right to direct the education of one's children. The Court discussed the two seminal cases establishing this right: *Meyers v. Nebraska*, 262 U.S. 390 (1923), which ruled in favor of a parental challenge against the State, overturning a state statute that forbade German from being taught in school, and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), which ruled in favor of a parental challenge against the State, overturning a statute requiring all minors to attend public schools as opposed to private or parochial schools. *Wisconsin v. Yoder*, to which the panel directly cites, overturned state legislation mandating compulsory school attendance until the age of sixteen because it violated two liberty interests maintained by members of the Amish community: the students' "fundamental rights . . . specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children." 406 U.S. 205, 214 (1972).[13]

Not only are these cases inapposite to the panel's opinion because they were not about parent-child conflict, but none involved a parent's right to *enlist* state aid generally, let alone enlist that aid to

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[13] *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006), to which the panel also cites, is not applicable either. *Ayotte* simply requires parental notification of a proposed abortion, and *even if the parent disagrees with the minor*, she can still have the abortion after the notice period. Moreover, there is a judicial bypass procedure which "must [be] authorize[d] if he or she finds that the minor is mature and capable of giving informed consent." 546 U.S. at 324.

purposely trump the constitutional right of a minor. Nor can the panel cite any case that does so.[14] Even assuming arguendo that parents *did* have the authority to infringe upon all minors' First Amendment rights as private actors, enlisting state enforcement would trigger the state action restriction of the First Amendment. Thus, even if such a hypothetical parent-child First Amendment conflict did exist, a private individual could not harness the power of the State to take any action that would directly violate another individual's constitutional right. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("The Constitution *confers upon no individual the right to demand action by the State* which results in the denial of equal protection of the laws to other individuals.") (emphasis added).

This is *not* a case pitting the rights of parents against children with the State as mediator but rather a prototypical example of the assertion of State power against the rights of their citizens – in this case, those of students. And the right to exercise one's conscience in not reciting the Pledge lies solely with the individual student, not with the parents of that student and certainly not with the State. This is no less true today than it was in 1943:

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[14] The only way this right might be implicated is if the State required all students to recite the Pledge and some parents did not want their children to participate. If the State gave parents no means to opt their children out, perhaps then objecting parents would have a right to assert *against* the State that such a statute violates their fundamental right of upbringing. But that scenario is neither relevant, nor even possible, under the current Pledge statute.

> Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.

Barnette, 319 U.S. at 644 (Black, J. and Douglas, J. concurring).

I believe this opinion is demonstrably wrong and merits en banc consideration

[PUBLISH]

FILED
U.S. COURT OF
APPEALS
ELEVENTH
CIRCUIT
July 23, 2008
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-14462

D. C. Docket No. 05-81142-CV-KLR

CAMERON FRAZIER,
through his mother and next friend,
Christine Frazier,

Plaintiff-Appellee,

versus

JOHN WINN,
In his official capacity as Commissioner
of the Florida Department of Education,
F. PHILLIP HANDY,
In his official capacity as Chairman

of the Florida State Board of Education,
DONNA CALLAWAY,
T. WILLARD FAIR,
ROBERTO MARTINEZ,
PHOEBE RAULERSON,
LINDA TAYLOR,
KATHLEEN SHANAHA,
In their official capacities as members
of the Florida State Board of Education,

Defendants-Appellants,

Appeal from the United States District Court
for the Southern District of Florida

(July 23, 2008)

Before EDMONDSON, Chief Judge, HILL and ALARCÓN,* Circuit Judges.

PER CURIAM:

This case involves Florida's Pledge of Allegiance statute, section 1003.44(1), Florida Statutes ("Pledge Statute"), which applies to students at all grade levels from kindergarten to twelfth grade. The statute states,

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* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

in pertinent part:

> The pledge of allegiance to the flag . . . shall be rendered by students. . . . The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state. Each student shall be informed by posting a notice in a conspicuous place that the student has *the right not to participate in reciting the pledge. Upon written request by his or her parent, the student must be excused from reciting the pledge.* When the pledge is given, *civilians must show full respect* to the flag *by standing at attention*, men removing the headdress, except when such headdress is worn for religious purposes . . . .

Fla. Stat. § 1003.44(1) (emphasis added).

Plaintiff (a minor), through his mother, filed a complaint challenging the constitutionality of the Pledge Statute, both facially and as applied to him as a then-eleventh grade student in a Palm Beach County public high school.[1] Plaintiff contended that section 1003.44(1) is facially invalid because it requires that a student obtain a parent's permission before being excused from reciting the Pledge of Allegiance and stand during the Pledge of Allegiance even if excused. Plaintiff sought declaratory and injunctive relief.

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[1] The as-applied claims did not involve the State and were resolved by consent order.

Accepting that the statute requires students to recite the Pledge unless a student has parental permission not to recite, the State defended the facial constitutionality of the statute. The State stressed the fundamental constitutional right of parents to control the upbringing of their minor children and to decide whether a child should participate in the Pledge. The State also argued that the statute's language requiring that "civilians" stand does not apply to "students" excused from the Pledge. The State moved to dismiss Plaintiff's claims on these grounds.

The district court issued an order denying the State's Motion to Dismiss and granting Plaintiff's Motion for Judgment on the Pleadings, which was treated by the district court as a Motion for Summary Judgment. The district court concluded that the Pledge Statute's requirement of parental consent was a facially unconstitutional restriction that "robs the student of the right to make an independent decision whether to say the pledge." The district court also construed the Pledge Statute to require that students excused from the Pledge must stand and concluded that this requirement was facially unconstitutional. The district court's ruling was made a final judgment. The State appealed. We affirm the district court's judgment in part and reverse it in part.[2]

We address the two requirements imposed by the Pledge Statute that Plaintiff alleges are facially

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[2] Whether the Pledge Statute is unconstitutional as applied to Plaintiff is not before us. We say nothing on that issue and decide nothing about the district court's judgment, except on the issue of whether the statute is facially unconstitutional.

unconstitutional. First, we address whether the statute's requirement that "civilians" stand at attention during the Pledge is facially unconstitutional. We then address the facial constitutionality of the statute's requirement that a student provide a written request by a parent to be excused from reciting the Pledge.

I. Requirement that Students Stand

The Pledge Statute states, in part, that "When the pledge is given, civilians must show full respect to the flag by standing at attention . . . ." Fla. Stat. § 1003.44(1). Plaintiff contends that this requirement is a violation of the First Amendment because it requires all students, even those excused from reciting the Pledge, to stand while the Pledge is given. We agree with Plaintiff. The "standing at attention" provision should not be enforced.[3] But we conclude that this portion of the statute may be severed, leaving the statute otherwise enforceable.

That students have a constitutional right to remain seated during the Pledge is well established. *See, e.g., Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1274, 1278 (11th Cir. 2004) (noting that the right to remain seated and silent during the Pledge is clearly established); *Banks v. Bd. of Public Instruction*, 314 F. Supp. 285, 294-96 (S.D. Fla. 1970), *aff'd*, 450

[3] The statute requires students who pledge to stand when reciting the Pledge. *See* Fla. Stat. § 1003.44(1) ("The pledge of allegiance to the flag . . . shall be rendered by students standing with the right hand over the heart."). This requirement applies independently of the "standing at attention" provision at issue here.

F.2d 1103 (5th Cir. 1971) (concluding that rule requiring students to stand during the Pledge was unconstitutional). The State does not contest that this is the law. Instead, the State argues that this Court – to avoid constitutional problems – should interpret the statute as requiring only students not exempted from the Pledge to stand.

The State is correct that, when deciding between two plausible statutory constructions, courts should adopt the construction that avoids constitutional problems. *See Clark v. Martinez*, 125 S. Ct. 716, 724 (2005) ("[W]hen deciding which of the two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail . . . ."). Here, however, the State's construction seems improbable to us. The Pledge Statute expressly requires "civilians" to stand during the Pledge. No limiting terms apply to "civilians"; it seems easily to cover all students. And no mention is made of the parental-written-request provision that applies to the requirement to recite the Pledge.

We agree with the district court on the construction of the statute. The most probable, accurate interpretation of the statute is that the term "civilians" distinguishes most people from "persons in uniform" – persons who are required by the rules pertaining to the use of the United States flag to render a military salute when the Pledge is recited. *See Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2305-06 (2004) (noting that section 7 of the Joint Resolution codifying the rules of use of the United

States flag provides that "Civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute").

Having determined that the Pledge Statute's requirement that "civilians" stand during the recitation of the Pledge in schools is a violation of the Constitution, we must consider whether this requirement is severable from the rest of the statute. We owe the work of the elected representatives of the people of Florida respect; and we will invalidate no more of the statute than we must. "The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *New York v. United States*, 112 S. Ct. 2408, 2434 (1992) (internal quotation marks omitted). General state practice in Florida also favors severability. *See Hershey v. City of Clearwater*, 834 F.2d 937, 939-40 (11th Cir. 1987) (citing *Kass v. Lewin*, 104 So. 2d 572, 577 (Fla. 1958) and *State ex rel. Limpus v. Newell*, 85 So. 2d 124, 128 (Fla. 1956)).

As we noted in *Hershey*, "The fact that an invalid portion of a statute is not self-contained in separate sections does not prohibit the court from applying the severability rule to strike the invalid portion and to preserve the rest of the enactment." 834 F.2d at 939. "[T]he Florida Supreme Court has struck a sentence

and even a phrase while preserving the remainder of a statute." *Id.*

Because nothing indicates that the Florida legislature would have declined to enact the Pledge Statute absent the provision which we see as unconstitutional, we conclude that the invalid "standing at attention" provision may be severed. In this way, the statute can survive the "standing at attention" challenge. But to the degree the district court's judgment determines that a student – who is excused from pledging – cannot be required by the Pledge Statute to stand, the judgment is affirmed.

II. Parental Consent Requirement

The Pledge Statute states that "The pledge . . . shall be rendered by students . . . . The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state." Fla. Stat. § 1003.44(1). The statute permits students an exception to this requirement, however. The exception is triggered when a student has presented a signed, written statement from his parent excusing him (the student) from participating: "Upon written request by his or her parent, the student must be excused from reciting the pledge." *Id.* Plaintiff challenges the statute, alleging that the statute's parental-permission requirement too broadly deters free speech and is facially unconstitutional: an overbreadth challenge.

An overbreadth challenge to a state statute "is based on a statute's possible direct and indirect burdens on speech. The overbreadth doctrine permits

the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial . . . ." *Weaver v. Bonner*, 309 F.3d 1312, 1318 (11th Cir. 2002) (internal quotation marks and citations omitted).[4]

For a federal court to invalidate a state statute on overbreadth grounds is – as the Supreme Court has said – "strong medicine." *Virginia v. Hicks*, 123 S.Ct. 2191, 2197 (2003). To establish that the Pledge Statute is facially invalid, Plaintiff must demonstrate that the statute punishes a "substantial" amount of protected free speech. *See id.* For overbreadth invalidation, the Supreme Court has insisted that the pertinent law's application to protected speech "be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Id.*

Within the framework of the facial challenge, we measure the Pledge Statute against the appropriate First Amendment standard. As the Supreme Court in *West Virginia State Bd. of Educ. v. Barnette* wrote, "freedoms of speech . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." 63 S. Ct. 1178, 1186 (1943). Although the Court in *Barnette* ruled that "the action of the local authorities in compelling the flag salute and pledge" violated the Constitution, the Court noted that "the refusal of [plaintiffs] to participate in the ceremony does not

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[4] As we have noted, the First Amendment's prohibition on laws abridging the freedom of speech applies to state governments through the Fourteenth Amendment. *Weaver*, 309 F.3d at 1318.

interfere with or deny rights of others to do so. . . . The sole conflict is between authority and rights of the individual." *Id.* at 1187, 1181.

We see the statute before us now as largely a parental-rights statute. As such, this case is different from *Barnette*. Although the statute here generally requires students to recite the Pledge, the statute also requires students to be notified that they might be excused from reciting the Pledge. The statute then spells out how a student may be excused, that is, by getting his parent's consent. Most important, the statute ultimately leaves it to the parent whether a schoolchild will pledge or not.

Here, unlike in *Barnette* and in the cases cited by Plaintiff, the refusal of students to participate in the Pledge – unless their parents consent – hinders their parents' fundamental right to control their children's upbringing.[5] The rights of students and the rights of parents – two different sets of persons whose opinions can often clash – are the subject of a legislative balance in the statute before us. The State, in restricting the student's freedom of speech, advances the protection of the constitutional rights of parents: an interest which the State may lawfully protect. *See, e.g.*, *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267 (1997) ("[T]he 'liberty' specially protected by the Due Process Clause

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[5] None of the decisions relied upon by Plaintiff and the district court decide the rights of custodial parents in opposition to the rights of their children because, in those cases, the custodial parent was not opposing the child's choice in exercising the child's speech. *See Barnette*, 63 S. Ct. at 1178; *Holloman*, 370 F.3d at 1252; *Banks*, 314 F. Supp. at 285.

includes the right[] . . . to direct the education and upbringing of one's children. . . .").

As the State pointed out before the district court and before us, the statute is neutral on the Pledge in the statute's deference to a parent's expressed wishes.[6] Should a parent request that his child not recite the Pledge – even where the child wishes to recite – the statute provides that the school must excuse the student. Fla. Stat. § 1003.44(1) ("Upon written request by his or her parent, the student must be excused from reciting the pledge."). Likewise, the school will protect the interests of a parent who refuses to send in a written request that his child be excused.

Although we accept that the government ordinarily may not compel students to participate in the Pledge, *e.g.*, *Barnette*, 63 S. Ct. at 1187, we also recognize that a parent's right to interfere with the wishes of his child is stronger than a public school official's right to interfere on behalf of the school's own interest. *See Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2391-92 (1995) (discussing public school official's more limited role vis-à-vis parents with

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[6] We suppose that the statute is not entirely neutral; the statute seems to start with the proposition that parents generally do not object to their student children reciting the Pledge. We accept (and no one in this case has contended otherwise) that the elected Florida legislature probably does know about what parents in the state of Florida generally would prefer. The structure of the statute does not, however, negate the State's legitimate interest in protecting the rights of all parents on the question of the Pledge and minor children; parents who express their intent either by sending in a written request or by declining to do so will have their views honored.

respect to infringing on a student's fundamental rights). And this Court and others have routinely acknowledged parents as having the principal role in guiding how their children will be educated on civic values. *See Wisconsin v. Yoder*, 92 S. Ct. 1526, 1541 (1972) (refusing to enforce a compulsory education requirement beyond the eighth grade where doing so would infringe upon the free exercise of the Amish religion and intrude on the "fundamental interest of parents . . . to guide the religious future and education of their children"); *Arnold v. Bd. of Educ. of Escambia County*, 880 F.2d 305, 313 (11th Cir. 1989) ("Within the constitutionally protected realm rests the parental freedom to inculcate one's children with values and standards which the parents deem desirable.").

We conclude that the State's interest in recognizing and protecting the rights of parents on some educational issues is sufficient to justify the restriction of some students' freedom of speech.[7] Even if the balance of parental, student, and school rights might favor the rights of a mature high school student in a specific instance, Plaintiff has not persuaded us that the balance favors students in a *substantial* number of instances – particularly those instances involving elementary and middle school students – relative to the total number of students covered by the

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[7] In addition, courts have limited the constitutional rights of minors and upheld state support of parental involvement in other contexts. *See Ayotte v. Planned Parenthood of N. New Eng.*, 126 S. Ct. 961, 966 (2006) (abortion); *Parents United For Better Sch., Inc. v. Sch. Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260, 274-77 (3d Cir. 1998) (condom distribution).

statute. *See, e.g., Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538 (7th Cir. 1996) ("Age is a critical factor in student speech cases."); *see also Broadrick v. Oklahoma*, 93 S. Ct. 2908, 2918 (1973) ("[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.").

We therefore decline to validate Plaintiff's facial challenge. To the degree that the district court's judgment invalidates the "written request by . . . parent" requirement of the Pledge Statute, the judgment is reversed. We stress that we decide and hint at nothing about the Pledge Statute's constitutionality as applied to a specific student or a specific division of students.

AFFIRMED IN PART and REVERSED IN PART.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 05-81142-CIV-Ryskamp/Vitunac

CAMERON FRAZIER, through his mother and next friend, Christine Frazier,

Plaintiff,

v.

CYNTHIA ALEXANDRE, et al.,

Defendants.
_____/

FINAL JUDGMENT

THE COURT having granted Plaintiff's Motion for Summary Judgment against the School Defendants and having denied the State Defendants' Motion for Summary Judgment against Plaintiff, hereby,

ORDERS AND ADJUDGES that FINAL JUDGMENT IS HEREBY ENTERED in favor of Plaintiff Cameron Frazier and against all Defendants. Frazier shall be entitled to the relief stipulated to in both the Consent Order and Joint Motion for Summary Judgment. The Clerk of Court shall CLOSE this case and DENY any pending motions as MOOT. The Court shall retain jurisdiction over this matter to enforce the

terms and conditions of the agreed upon relief.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 11th day of July, 2006.

/s KENNETH L RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
All parties and counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 05-81142-CIV-Ryskamp/Vitunac

CAMERON FRAZIER, through his mother and next friend, Christine Frazier,

Plaintiff,

v.

CYNTHIA ALEXANDRE, et al.,

Defendants.
_____/

ORDER GRANTING PLAINTIFF AND STATE DEFENDANTS' JOINT MOTION FOR FINAL SUMMARY JUDGMENT

THIS CAUSE comes before the Court pursuant to the Plaintiff and State Defendants' Motion for Final Summary Judgment, filed June 12, 2006 **[DE 46]**.

Plaintiff and the State Defendants submit this motion in compliance with the Court's May 31, 2006 **[DE 43]** Order Denying State Defendant's Motion to Dismiss and Granting Plaintiff's Motion for Summary Judgment. For purposes of judicial economy, the parties agree that the Court's ruling on the facial constitutionality of Fla. Stat. s. 1003.44(1) in the May 31 Order has disposed of the sole issue for which the State Defendants were named in this action, namely, to defend the facial constitutionality of said statute. Accordingly, it is hereby

ORDERED AND ADJUDGED that the State Defendants' Motion to Dismiss is converted to a Motion for Summary Judgment pursuant to Fed.R.Civ.P. 12(b). The Court, having considered the record in this matter in its entirety, hereby

ORDERS AND ADJUDGES that the Motion for Summary Judgment, filed June 12, 2006 **[DE 46]**, is GRANTED. Summary judgment is hereby entered in favor of Plaintiff and against the State Defendants. Fla. Stat. s. 1003.44(1) is unconstitutional on its face. Final judgment shall be issued by separate order. It is further

ORDERED AND ADJUDGED that should Plaintiff finally prevail in this action upon the exhaustion of any applicable appeals, the parties agree to the following relief:

a. a declaratory judgment that Subsection 1003.44(1), Fla. Stat. is facially unconstitutional according to the judgment issued by the final court in this matter;

b. State Defendants shall notify Florida's school districts of the Final Ruling, in writing, and that Subsection 1003.44(1), Fla. Stat., should not be enforced according to the judgment issued by the final court in this matter; and

c. this court shall retain jurisdiction to enforce the terms and conditions

of the agreed upon relief.

DONE AND ORDERED at Chambers in West Palm Beach, Florida, this 11th day of July, 2006.

/s KENNETH L RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:
All parties and counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 05-81142-CIV-Ryskamp/Vitunac

CAMERON FRAZIER, through his mother and next friend, Christine Frazier,

Plaintiff,

v.

CYNTHIA ALEXANDRE, et al.,

Defendants.
_____/

ORDER DENYING STATE DEFENDANT'S MOTION TO DISMISS AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court pursuant to Defendants John Winn, F. Philip Handy, Donna Callaway, T. Willard Fair, Roberto Martinez, Phoebe Raulerson, Linda Taylor and Kathleen Shanahan's (collectively, "State Defendants") February 9, 2006 [DE 31] Motion to Dismiss Counts Four and Five of the Amended Complaint.[1] Plaintiff Cameron Frazier

[1] John Winn is the Commissioner of the Florida Department of Education. The remaining State Defendants are members of the Florida State Board of Education.

("Frazier") responded on February 21, 2006 **[DE 35]**. The State Defendants replied on March 6, 2006 **[DE 37]**.

This cause is also before the Court pursuant to Frazier's Motion for Judgment on the Pleadings against Defendants Cynthia Alexandre ("Alexandre"), Richard Poorman ("Poorman") and the Palm Beach County School District ("District") (collectively, "School Defendants"), filed February 21, 2006 **[DE 34]** pursuant to the February 6, 2006 **[DE 30]** Consent Order between Frazier and these Defendants. The State Defendants responded on March 13, 2006 **[DE 40]**. Frazier replied on March 22, 2006 **[DE 41]**. Alexandre, also sued in her individual capacity, adopts the State Defendants' arguments in favor of dismissal as her own.

I. BACKGROUND

At the time of the filing of this action, Frazier was an eleventh grade student at Boynton Beach Community High School, Palm Beach County School District, Florida. (Am.Compl.¶ 1.) Because of his personal political beliefs and convictions, he does not want to recite, or stand during, the pledge of allegiance each morning. (Am.Compl.¶ 1.) The District Board, following Fla. Stat. § 1003.44(1)[2], has a policy

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[2]The Florida pledge statute provides as follows:

> Each district school board may adopt rules to require, in all of the schools of the district, programs of a patriotic nature to encourage greater respect for the government of the United States and its national anthem and flag, subject

always to other existing pertinent laws of the United States or of the state. When the national anthem is played, students and all civilians should stand at attention, men removing the headdress, except for when such headdress is worn for religious purposes. The pledge of allegiance to the flag, "I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all," shall be rendered by students standing with the right hand over the heart. The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state. Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge. Upon written request by his or her parent, the student must be excused from reciting the pledge. When the pledge is given, civilians must show full respect to the flag by standing at attention, men removing the headdress, except when such headdress is worn for religious purposes, as provided by Pub.L. ch. 77-435, s. 7, approved June 22, 1942, 56 Stat. 377, as amended by Pub.L. ch. 77-806, 56 Stat. 1074, approved December 22, 1942.

Fla. Stat. § 1003.44(1). The school district policy based thereon provides as follows:

> The Pledge of Allegiance
>
> Florida Statutes Section 1003.44 requires the Pledge of allegiance to be recited at the beginning of the day in every public elementary, middle and high school in the state. Each student has the right not to participate in reciting the pledge. When a parent requests in writing, the student

mandating that students, unless excused by written request of a parent, recite the pledge of allegiance.[3] (Am. Compl. ¶ 1; Student and Family Handbook, p. 16.)[4] The policy further requires that students, even if

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> must be excused from reciting the pledge. Any student who is excused from reciting the pledge must still show full respect for the flag by standing at attention while the pledge is recited; men must remove any headdress, except when it is worn for religious purposes.

(Am.Compl.Ex. 1.)

[3] The school district policy based thereon provides as follows:

> The Pledge of Allegiance
>
> Florida Statutes Section 1003.44 requires the Pledge of allegiance to be recited at the beginning of the day in every public elementary, middle and high school in the state. Each student has the right not to participate in reciting the pledge. When a parent requests in writing, the student must be excused from reciting the pledge. Any student who is excused from reciting the pledge must still show full respect for the flag by standing at attention while the pledge is recited; men must remove any headdress, except when it is worn for religious purposes.

(Am.Compl.Ex. 1.) The District's Student and Family Handbook provides as follows:

> Students have a right to be excused from reciting the Pledge of Allegiance upon written request by a parent or guardian (F.S.1003.44(1)).

[4] Because Frazier's motion for judgment on the pleadings attaches for the first time an excerpt from the District's Student and Family Handbook, the Court will treat the motion as one for summary judgment pursuant to Rule 56.

excused from reciting the pledge, must stand at attention while the pledge is recited. (Am.Compl.¶ 1.) Frazier alleges that this policy, the statute upon which it is based, as well as the actions of the individual defendants, are in violation of the First and Fourteenth Amendments to the United States Constitution. (Am.Compl.¶ 1.) He brings this 42 U.S.C. § 1983 action through his mother and next friend, Christine Frazier. (Am.Compl.¶ 3, 5.)

On December 8, 2005, Frazier was in Alexandre's fourth period math class, when the pledge of allegiance was to be recited. (Am.Compl.¶ 11.) The students ordinarily recited the pledge earlier in the day; December 8 marked the first time the recitation occurred when Frazier was in Alexandre's class. (Am.Compl.¶ 11.) When Frazier did not stand for the recitation, Alexandre ordered him to stand. Frazier refused. (Am.Compl.¶ 12.) Alexandre again ordered Frazier to stand. Frazier again refused, explaining that he had not stood for the pledge since the sixth grade and that he was not going to change his practice. (Am.Compl.¶ 13.)

Alexandre responded, saying "oh you wanna bet? See your desk? Now look at mine. Big desk, little desk. You obviously don't know your place in this classroom." (Am.Compl.¶ 14.) Frazier responded: "I thought this was a classroom. Why must you insist on taking this so far?" Alexandre then said: "I will take this as far as I need to. I will fight this to the top." (Am.Compl.¶ 15.) Frazier responded: "I'm sorry, I do not stand for the flag." (Am.Compl.¶ 16.) Alexandre, becoming angry, was looking through her filing cabinet and said: "I'm

sorry, did you say you don't stand for the f----flag!" Frazier responded "no, I said the flag." Other class members then said "Yes, Mrs. Alexandre, he said flag." (Am.Compl.¶ 17.) Alexandre then handed Frazier a document with the Palm Beach County School District's logo on it and told Frazier: "Read this. Florida state statutes say you may choose not to say the pledge ONLY by written request by your parent AND you still must stand!" (Am. Compl. ¶ 18; Am. Compl. Ex. 1.) Frazier replied that he had heard that before but was told that he did not need to have a parent excuse him from reciting the pledge of allegiance. He reiterated that he did not stand for the pledge of allegiance. (Am.Compl.¶ 19.) Alexandre then said: "You clearly have no respect! You are so ungrateful and so un-American. Do you know what's out there fighting our war? That flag you refuse to show respect to." (Am.Compl.¶ 20.) Frazier replied "no, our soldiers are out fighting a war. The flag is an inanimate piece of cloth that doesn't move and surely can't hold a gun." Alexandre said "You are so ridiculous! I can't believe you are so disrespectful!" (Am.Compl.¶ 21.) Frazier tried to respond, saying "I choose not to say the ..." but was interrupted by Alexandre who said "No! You're out of here. I'm so sick of you!" She called the principal's office and requested that Frazier be removed from the class. She then crossed her arms and stared at Frazier. (Am.Compl.¶ 22.)

Shortly thereafter, Poorman, the assistant principal, Salvatore Camp ("Camp"), another administrator, and a school police officer came to the classroom. (Am.Compl.¶ 23.) Alexandre told them that

"I have an extremely disrespectful student who refuses to stand for the pledge." Camp asked who it was and Frazier raised his hand. (Am.Compl.¶ 23.) Camp directed Frazier to get his things, which he did and left the classroom. (Am.Compl.¶ 24.) In the meantime, Alexandre gave Poorman a copy of the school district's policy. (Compl.¶ 24.) Poorman told Frazier to go to the office. (Compl.¶ 25.)

Frazier waited for Poorman in the principal's office for about half an hour. Poorman came in and handed Frazier the school policy, with a signature line for his mother's signature, and instructed him to have her sign it. (Am.Compl.¶ 26.) Poorman told Frazier that he had talked to his mother but that he would still have to stand during the pledge of allegiance. (Am.Compl.¶ 26.) Frazier was then made to sit in the office until the class period was over and was not allowed to return to the classroom that day. (Am.Compl.¶ 27.) He was humiliated by the actions of the individual defendants. (Am.Compl.¶ 27.)

Although he has not been punished again since the incident on December 8, Frazier remains subject to District policy, and state law, that could result in additional punishment at any time a teacher or administrator decides to enforce those policies. (Am.Compl.¶ 30.) Frazier believes he has been, and will continue to be irreparably harmed by his continued punishment and denial of his constitutional right. Frazier claims that unless restrained by this Court, he will continue to be subjected to verbal abuse or other punishment for the exercise of his First Amendment right of expression by remaining seated

during the pledge of allegiance and not reciting the pledge. (Am.Compl.¶ 31.)

Frazier sues both Alexandre and Poorman in their individual capacities for damages and injunctive relief. (Am.Compl.¶ 2.) Frazier also sues Poorman in his official capacity. (Am.Compl.¶ 7.) Plaintiff seeks declaratory and injunctive relief against the District for its alleged unconstitutional policies. (Am.Compl.¶ 2.) The District is a public entity created by Fla. Stat. § 1001.30 and is governed by the Palm Beach County School District Board, which is subject to suit pursuant to Fla. Stat. § 1001.41(4). (Am.Compl.¶ 8.)

Frazier seeks declaratory and injunctive relief against the State Defendants in their official capacities. (Am.Compl.¶ 2.) Pursuant to Fla. Stat. § 1001.10, the Commissioner of Education is the chief educational officer of the State of Florida and is responsible for giving full assistance to the State Board of Education in enforcing compliance with state polices regarding education. (Am.Compl.¶ 9.) One of the duties of the State Board of Education is "to enforce systemwide education goals and policies." Fla. Stat. § 1001.02(2)(r). The State Board of Education is specifically charged with enforcing compliance with law by all school districts in the State of Florida. Fla. Stat. § 1001.03(8). (Am.Compl.¶ 10.)

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). (Am.Compl.4.) Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202, and injunctive relief pursuant to Fed.R.Civ.P. 65. (Am.Compl.¶ 5.)

Counts I and II, brought against Alexandre and Poorman, allege that their actions deprived Frazier of his right to refuse to recite the pledge of allegiance, and to remain seated during the pledge of allegiance, in violation of the First and Fourteenth Amendments to the United States Constitution. Frazier seeks injunctive relief and compensatory damages against both and punitive damages against Alexandre. (Am.Compl.¶ 35-36.) Count III, brought against the District, alleges that the District's customs and policies directly caused the violation of Frazier's right to refuse to recite the pledge of allegiance, and to remain seated during the pledge of allegiance, in violation of the First and Fourteenth Amendments to the United States Constitution. (Am.Compl.¶ 37.)

Count IV, brought against the State Defendants, alleges that Fla. Stat. § 1003.44(1), to the extent it requires a student to obtain a parent's permission before being excused from reciting the pledge of allegiance and requires a student to stand during the pledge of allegiance, violates plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution. (Am.Compl.¶ 38.)

Count V, brought against all Defendants, alleges that the Supremacy Clause of the U.S. Constitution, Art. VI, Clause 2, provides that the federal Constitution is "the supreme Law of the Land" notwithstanding any state or local law to the contrary. (Am.Compl.¶ 39.) Frazier alleges that Fla. Stat. § 1003.44(1), and District policies, directly contravene the Constitution as set out above and are therefore pre-empted by the Constitution to the extent of the

contradiction. (Am.Compl.¶ 40.)

Frazier requests a declaratory judgment that Fla. Stat. § 1003.44(1) and the District policy, to the extent they require a student to obtain a parent's permission before being excused from reciting the pledge of allegiance and require a student to stand during the pledge of allegiance, are unconstitutional on their face and as applied to him. Frazier also requests a preliminary and permanent injunction enjoining the School Defendants from disciplining or otherwise subjecting him to adverse action for his refusal to recite the pledge of allegiance and for his remaining seated during the pledge of allegiance. Frazier requests compensatory damages from the School Defendants and punitive damages from Alexandre. As to the State Defendants, Frazier requests a declaration that his rights were violated, preliminary and permanent injunctions enjoining the enforcement of the statute to the extent it requires a student to obtain a parent's permission before being excused from reciting the pledge of allegiance and requires a student to stand during the pledge of allegiance, as well as a permanent injunction enjoining the State Defendants from taking affirmative steps to ensure that Florida school districts comply with the United States Constitution by not enforcing Fla. Stat. § 1003.44(1), or any school district policies based upon that statute, to the extent they require a student to obtain a parent's permission before being excused from reciting the pledge of allegiance and require a student to stand during the pledge of allegiance. Frazier requests the costs and expenses of this action together with reasonable attorneys' fees, judicial retention of jurisdiction, as well

as such other and further relief as the Court may deem just and proper.

On February 6, 2006 [**DE 30**], the Court entered a Consent Order upon consent of Frazier and the School Defendants. For purposes of this lawsuit only and for purposes of deciding the constitutionality of the statute, the School Defendants stipulate to the facts plead in the First Amended Complaint and agree that the case may be resolved by a motion for judgment on the pleadings pursuant to Rule 12(c), (here, treated as a Rule 56 motion for summary judgment) without the need for an answer to be filed. The District stipulated that, for purposes of this lawsuit only, it, normally following Fla. Stat. § 1003.44(1), has a custom or practice mandating that students, unless excused by written request of a parent, recite the pledge of allegiance. The custom or practice further requires that students, even if excused from reciting the pledge, must stand at attention while the pledge is recited. The District agrees, for purposes of this lawsuit only, that such customs or practices are sufficient to subject it to liability under *Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38 (1978), if Frazier is correct in his constitutional claims. Otherwise stated, these parties believe that the constitutionality of Fla. Stat. § 1003.44(1) is dispositive of Frazier's claims: if the statute is unconstitutional, the District's customs and practices based thereon are unconstitutional as well.

The State Defendants have moved to dismiss Counts IV and V pursuant to Rule 12(b)(6) as well as all claims for non-prospective relief. Frazier has moved

for judgment on the pleadings, which the Court will treat as a motion for summary judgment. The Court will address these motions in tandem.

II. LEGAL STANDARD

A. Motion to Dismiss

A complaint must be dismissed for failure to state a claim if no set of facts could be proven that would support a claim for relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232 (1984). *See also Bracewell v. Nicholson Air Servs.*, 680 F.2d 103, 104 (11th Cir.1982). The court should accept all well-pleaded allegations as true and view the motion in the light most favorable to the non-moving party. *See Hishon*, 467 U.S. at 73, 104 S.Ct. at 2232. However, a plaintiff must do more than merely label his or her claims. *See Blumel v. Mylander*, 919 F.Supp. 423, 425 (M.D.Fla.1996). Dismissal of a complaint or a portion thereof is appropriate when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action. *See Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir.1993).

B. Motion for Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party moving for summary judgment "always bears the

initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986) (quoting Fed.R.Civ.P. 56(c)). An issue is "material" if it is a legal element of the claim under applicable substantive law that may affect the resolution of the action. *See Anderson v. Liberty Lobby,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). An issue is "genuine" if the record, taken as a whole, could lead a rational trier of fact to find for the non-moving party. *See id.,* 106 S.Ct. at 2510. The movant may meet this standard by presenting evidence demonstrating the absence of a dispute of material fact or by showing that the nonmoving party has not presented evidence in support of an element of its case on which it bears the burden of proof. *Celotex,* 477 U.S. at 322-23, 106 S.Ct. at 2552-53. The moving party need not supply "affidavits or other similar materials negating the opponent's claim." *Id.,* 106 S.Ct. at 2552-53.

Once the moving party meets its burden, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324, 106 S.Ct. at 2553 (quoting Fed.R.Civ.P. 56(e)). Although the nonmovant need not present evidence that would be admissible at trial, it may not rest on his pleadings. *Id.,* 106 S.Ct. at 2553. "[T]he plain language of rule 56(c) mandates the entry

of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322, 106 S.Ct. at 2552. *See also Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1281-82 (11th Cir.1999).

III. DISCUSSION

A. Standing

The State Defendants dispute that Frazier has standing to bring either facial or as applied challenges to the statute. As to the facial challenge, the State Defendants argue that Frazier improperly attempts to assert the rights of third parties. As to the as applied challenge, the State Defendants argue that the statute was never applied against Frazier because he did not have a parent's permission to be excused from reciting the pledge. The State Defendants also contend that Frazier's failure to seek parental permission renders his challenge moot.

The State Defendants argue that because Frazier's parent never sought to excuse him from participating in the pledge, he "lacks standing to raise a claim against the school's 'students must stand' policy or any related facial claim," citing *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975), and *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324 (1984), for the proposition that Frazier cannot assert third party rights as his basis for seeking relief. This argument is untenable for several reasons.

First, this argument assumes the constitutionality of the parental consent provision. As the analysis herein indicates, Frazier asserts First Amendment rights personal to him for which he does not need parental consent. Failure to obtain parental permission therefore does not render Frazier's challenge moot. Second, even if Frazier were resting his claim on the interests of third parties, he would still have standing, as application of this regulation affects all underage students in the District who may want to say the pledge but whose parents have requested they be excused from same. *Warth* and *Allen* do stand for the proposition that litigants are normally prohibited from asserting the "legal rights or interests of third parties," *Warth*, 422 U.S. at 499, 95 S.Ct. at 2205, but both cases were 14th Amendment equal protection cases. In the First Amendment context, however, the Supreme Court has relaxed the limitation on asserting the legal rights of third parties. *See Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956-58, 104 S.Ct. 2839, 2846-48 (1984) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.") (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-13, 93 S.Ct. 2908, 2916 (1973)). First Amendment plaintiffs may assert the rights of third parties so long as they can demonstrate that they personally suffered some cognizable injury. *See Joseph H. Munson Co.*, 467 U.S. at 958, 104 S.Ct. at 2847-48. The plaintiff is

allowed to lodge a facial attack not because his "own rights of free expression [have been] violated," but because of the "assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick,* 413 U.S. at 612, 93 S.Ct. at 2916. *See also Freedman v. Maryland,* 380 U.S. 51, 56, 85 S.Ct. 734, 738 (1965) (allowing challenges to licensing statutes delegating unbridled discretion to licensing authority, recognizing the "'danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.'") (quoting *NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 338 (1963); *Lovell v. Griffin,* 303 U.S. 444, 452-53, 58 S.Ct. 666, 669 (1938)) (unnecessary to seek permit to challenge ordinance requiring permit to distribute printed literature because ordinance infringed freedom of the press and was therefore facially invalid).

Here, Frazier suffered injury in fact: he was removed from the classroom, subjected to verbal castigation by Alexandre, and was personally subjected to the statute's requirement that even if he did not recite the pledge, he would have to remain standing. (Am.Compl.¶ 18, 26.) *See Holloman v. Harland,* 370 F.3d 1252, 1268-69 (11th Cir.2004) (verbal censure and singling student out constitutes punishment). These injuries in fact resulted from practices and customs based upon Fla. Stat. § 1003.44(1). Frazier's injury will be redressed by a favorable decision by this Court. Frazier has thus satisfied the requirements of Article III standing and may bring a facial challenge to all parts of the statute. *See Lujan v. Defenders of Wildlife,*

504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136 (1992) (injury in fact, causation and redressability necessary for Article III standing).

The State Defendants maintain that the as applied challenge is lacking because Frazier did not secure parental permission to be excused. The State Defendants also maintain that an as applied challenge is deficient because the statute allows non-participating students (who have secured parental permission) to remain seated during the pledge.

According to the State Defendants, a student not reciting the pledge need not stand or place a hand over his or her heart, as the statute addresses a student "standing" only with respect to those students who actually recite the Pledge: "The pledge of allegiance ... shall be rendered by students standing with the right hand over the heart." The term "reciting the pledge," according to the State Defendants, indicates that students are excused from performing all three indicia of Pledge participation: orally rendering, standing, and putting a right hand over their heart. Although the statute provides that "[w]hen the pledge is given, *civilians* must show full respect ... by *standing* at attention," the State Defendants assert that this sentence does not apply to students because the subsection specifically distinguishes "students" from non-student "civilians," as it earlier referred to them separately with the regard to the national anthem: "When the national anthem is played, *students and all civilians* shall stand at attention." (emphasis added). The State Defendants note that a "civilian," is "one who is not an active member of the military or police,"

indicating that the statute separates two groups of individuals that have different rights and responsibilities in the school context: "students" and non-student "civilians." The American Heritage Dictionary of the English Language, 4thed., at 340 (2000). In essence, the State Defendants argue that because the specific word "student" is referenced in the first part of the challenged statute and is followed by the broader term "civilian," that "civilian" excludes "students." By explicitly demarcating Pledge participation requirements for students and civilians, the statute conveys that the last sentence does not apply to students, that is, non-participating students are not required to stand for the pledge.

Frazier argues that the statute requires non-participating students to stand. He notes that the statute is found in Chapter 1003 of Florida's Education Code, which covers "Public K-12 Education." The specific section itself is located in Part IV-"Public K-12 Educational Instruction;" the title of § 1003.44 is "Patriotic programs; rules," and the section authorizes "district school board[s][to] adopt rules to require" patriotic programs and requires the pledge to be recited in Florida's public schools each morning. Frazier finds it absurd to suggest that this provision-specifically addressing patriotic programs in Florida's public elementary, middle and high schools-is a general requirement that every non-military person within the State of Florida, upon hearing the pledge of allegiance, is required to "show full respect to the flag by standing at attention." If the statute only applies to schools, "civilians" would include instructional staff, administrators, support personnel, cafeteria workers,

custodial staff, or school visitors. Were such the case, the State of Florida would be commanding those individuals, but not its students, to stand at attention for the pledge recitation. Students would then possess greater rights than these other individuals. Not only does that interpretation bring about an absurd result, it also runs afoul of the *ejusdem generis* cannon of construction, which provides that "where the enumeration of specific things ["student"] is followed by a more general word or phrase ["civilian"], the general phrase is construed to refer to a thing of the same nature as the preceding specific things." *Florida Dep't of Revenue v. James B. Pirtle Constr. Co.*, 690 So.2d 709, 711 (Fla. 4th DCA 1997) (citing *Hanna v. Sunrise Recreation, Inc.*, 94 So.2d 597, 599-600 (Fla.1957)).

The inclusion of "civilian" in the statute reflects the language of the original federal statute. In 1942, Congress adopted, and the President signed, a Joint Resolution codifying a detailed set of "rules and customs pertaining to the display and use of the flag of the United States of America." Chapter 435, 56 Stat. 377. Section 7 of this codification provided in full:

> That the pledge of allegiance to the flag, 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all', be rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words 'to the flag' and holding this position until the end, when the hand

> drops to the side. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute.

Elk Grove Unified School District v. Newdow, 542 U.S. 1, 6-7, 124 S.Ct. 2301, 2305-06 (2004) (citations omitted). Section 7 of House Joint Resolution 359, approved December 22, 1942, 56 Stat. 1074, 36 U.S.C. (1942 Supp.) s 172, 36 U.S.C.A. s 172, set no penalty for nonconformity but provides:

> That the pledge of allegiance to the flag, 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all', is rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. [Persons in uniform shall render the military salute.]

West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 n. 17, 63 S.Ct. 1178, 1185 n. 17 (1943). The text accompanying this footnote explains that this provision made "flag observance voluntary." *Id.* at 638, 63 S.Ct. at 1185. Hence, civilians not reciting the pledge were expected to show respect for the flag by standing. The original Florida statute did not mention students in the pledge of allegiance section and

employed the exact language of the incorporated U.S. Public Laws:

> The Board of Public Instruction of any county is hereby authorized to adopt rules and regulations pertaining to and requiring to be used in all of the schools of the county any program of a patriotic nature to encourage greater respect for the government of the United States, its national anthem and flag ...
>
> PROVIDED, that when the national anthem is played, students and all civilians shall always stand at attention, men removing the headdress. PROVIDED FURTHER, that the pledge of allegiance to the flag, "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all", be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress, as provided by Section 7 of United States Public Law No. 623, approved June 22, 1942, as amended by United States Public Law No. 829, approved December 22, 1942.

Laws of Florida-1943-Chap. 22015 (emphasis added).

The federal standards incorporated into the current state statute divided the population into two

components: civilians and military personnel and prescribed the proper way for both groups to show respect for the flag. The inclusion of the term "civilian" is hardly a choice by the Florida legislature to distinguish between "students" and "non-student civilians" as suggested by the State Defendants. A plain reading of the statute confirms that the Palm Beach County School Board's customs and practices are indeed based upon a correct interpretation of Fla. Stat. § 1003.44(1).

Nor is the State Defendants' reading of the statute entitled to deference. Ordinarily, "[a]n agency's interpretation of the statute it is charged with enforcing is entitled to great deference." *Verizon Florida v. Jacobs,* 810 So.2d 906, 908 (Fla.2002) (citing *BellSouth Telecommunications, Inc. v. Johnson,* 708 So.2d 594, 596 (Fla.1998)). This rule applies only in the face of statutory ambiguity, however. "There is no need to resort to other rules of statutory construction when the language of the statute is unambiguous and conveys a clear and ordinary meaning." *Id.* (citing *Starr Tyme, Inc. v. Cohen,* 659 So.2d 1064, 1067 (Fla.1995)). "If the intent of [the legislature] is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of [the legislature]." *State v. Sun Gardens Citrus, LLP,* 780 So.2d 922, 925 (Fla. 2d DCA 2001) (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82 (1984)). As noted, in a statute aimed at patriotic programs in Florida's classrooms, the clear and ordinary meaning of "civilians"

necessarily includes "students."[5] The statute does require non-pledging students to stand for the recitation. Frazier's as applied challenge may address

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[5] Deference is also inappropriate where there is no agency adjudication at issue. Under Florida's Administrative Procedure Act, an agency adjudication is effected only by a rule, Fla. Stat. § 120.52(15), or an order, § 120.52(7). The State Defendants cite no agency decision or rule construing § 1003.44(1). An interpretation expressed in by an agency lawyer in a court paper is not entitled to deference. *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655 (2000)(legal opinions by lawyers that lack the force of law are not entitled to deference); *FLRA v. United States Dep't of Treasury*, 884 F.2d 1446, 1455 (D.C.Cir.1989)("[A] position established only in litigation may have been developed hastily, or under special pressure, or without an adequate opportunity for presentation of conflicting views.").

Deference is also unwarranted when the law does not charge the agency with interpreting the statute at issue. *See United Faculty of Florida v. Public Employees Relations Comm'n*, 898 So.2d 96, 101 (Fla. 1st DCA 2005). While the State Defendants have overall authority for enforcement of school district compliance with state education law and state board rules, the district school boards are "primarily responsible for compliance with law and state board rule." Fla. Stat. § 1008.32. The statute specifically delegates to "[e]ach district school board" the power to implement the statute by "adopt[ing] rules to require, in all of the schools of the district, programs of a patriotic nature ...." No similar delegation of Legislative rule-making power exists for the State Board of Education.

Finally, a Florida court "need not defer to an agency's construction or application of a statute if special agency expertise is not required." *Florida Hosp. v. Agency for Health Care Admin.*, 823 So.2d 844, 848 (Fla. 1st DCA 2002) (citing *Doyle v. Dep't of Bus. Reg.*, 794 So.2d 686, 690 (Fla. 1st DCA 2001)). The State Defendants do not argue that special expertise is required to construe the statute. For these reasons, the State Defendants' interpretation is entitled to no deference by this Court.

this portion of the statute. The Court previously noted that Frazier's failure to secure parental consent does not nullify his standing to assert rights personal to him.

Finally, the State Defendants argue that they cannot be subject to an as applied challenge because the Amended Complaint does not allege that they are responsible for enforcing the pledge statute. The Amended Complaint expressly alleges that the State Defendants are charged with such authority, however. As noted, one of the duties of the State Board of Education is "to enforce systemwide education goals and policies." Fla. Stat. § 1001.02(2)(r). Furthermore, the State Board of Education is specifically charged with enforcing compliance with law by all school districts in the State of Florida. Fla. Stat. § 1001.03(8). (Am.Compl.¶ 10.) Frazier may bring facial and as applied challenges as to all parts of the pledge statute.

C. Free Speech Analysis

The State Defendants argue that a child may not independently assume, veto or otherwise block the right of a parent or guardian to direct the education of his or her child, maintaining that none of the pledge cases establish the "constitutionally novel principle" that a child may make his or her own decision whether to say the pledge.

The First Amendment protects both affirmative and negative free speech rights. *See* U.S. CONST. AMEND. I. *See also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573, 115 S.Ct. 2338, 2347 (1995) ("[O]ne who chooses to

speak may also decide what not to say.") (quotation omitted); *Riley v. National Fed'n for the Blind, Inc.*, 487 U.S. 781, 796-97, 108 S.Ct. 2667, 2677 (1988) ("[F]reedom of speech... necessarily compris[es] the decision of both what to say and what not to say.") (quotation omitted); *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 1435 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.... [These rights] are complementary components of the broader concept of 'individual freedom of mind.' " (citation omitted)); *Barnette*, 319 U.S. at 645, 63 S.Ct. at 1189-90 (Murphy, J., concurring) ("[T]he right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all....").

While student First Amendment rights are not "automatically coextensive with the rights of adults in other settings," it is a longstanding rule of constitutional law that a student may remain quietly seated during the pledge on grounds of personal or political belief. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S.Ct. 3159, 3164 (1986). As the Supreme Court has stated "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 736 (1969) (upholding the First Amendment right of students to silently protest by wearing black armbands). Schools may still punish

behavior that is disruptive to the school's educational goals, however. See *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 268, 108 S.Ct. 562, 568 (1988) (principal may delete from school newspaper material that is "inconsistent" with the school's "educational mission"); *Bethel,* 478 U.S. at 682, 106 S.Ct. at 3164 (appropriate to discipline student who delivered sexually explicit, but not obscene, speech at a school assembly).

Frazier does not challenge the daily recital of the pledge in Florida's classrooms. Nor does he challenge the content of the pledge. He challenges only the authority of the state to override *his* conscience and compel *his* participation in such an exercise. *Barnette* first recognized a student's right to refrain from pledge participation. *Barnette* involved a West Virginia State Board of Education resolution that provided for "regular" flag salutes and deemed refusal to participate an "act of insubordination" punishable by expulsion of the student and criminal prosecution of student's parent(s) or guardian(s). 319 U.S. at 626, 629, 63 S.Ct. at 1179, 1181. The resolution was enacted pursuant to a West Virginia statute passed for the purpose of "teaching, fostering and perpetuating the ideals, principles and spirit of Americanism ...." *Id.* at 640-42, 63 S.Ct. at 1186-87 (footnote and citations omitted). The requirement prompted objections by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federation of Women's Clubs that the salute was "too much like Hitler's" salute. While some modification was apparently made to those concerns, "no concession was made to Jehovah's Witnesses,"who deemed uttering the pledge and

performing the salute violations of their faith's prohibition against bowing to graven images. *See id.* at 628-29, 63 S.Ct. at 1180-81. The Supreme Court held that the objectors could not be compelled to participate in pledge exercises in the interest of preserving their "right of self-determination in matters that touch individual opinion and personal attitude." *Id.* at 631, 63 S.Ct. at 1182. As the Court wrote:

> The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

Id. at 630-31, 63 S.Ct. at 1181-82. *Barnette* did not ask whether the "State may require teaching by instruction

and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country." *Id.* at 631, 63 S.Ct. at 1182 (quotation omitted). Rather, the question was whether the State may compel "students to *declare a belief.*" They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is "whether this slow and easily neglected route to aroused loyalties constitutionally may be shortcut by substituting a compulsory salute and slogan." *Id.*, 63 S.Ct. at 1182. The Court conclusively ruled that free speech was the underlying issue in mandated pledge recitation:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 642, 63 S.Ct. at 1187.

The Eleventh Circuit has twice upheld the basic right of students to remain silent and seated during the pledge of allegiance. In *Banks v. Bd. of Public Instr.*, 314 F.Supp. 285, 296 (S.D. Fla.1970), *vacated by* 401 U.S. 988 (1971), *reinstated without published opinion by dist. ct. and aff'd,* 450 F.2d 1103 (5th Cir.1971), the original three judge court held that Dade

County school rule 6122, which required students to stand during the pledge of allegiance, was unconstitutional: "The right to differ and express one's opinions, to fully vent his First Amendment rights, even to the extent of exhibiting disrespect for our flag and country by refusing to stand and participate in the pledge of allegiance, cannot be suppressed by the imposition of suspensions." Less than two years ago, the Eleventh Circuit held the law to be clearly established in this area so as to deny individual school personnel a claim of qualified immunity and subject them to personal liability for punishing students for not reciting the pledge, remaining seated during the pledge, or even silently protesting during the pledge of allegiance. *Holloman,* 370 F.3d at 1278-78 (right to remain seated and silent during the pledge of allegiance, as well as right to silently raise fist during the pledge, is clearly established).

The Third Circuit recently stressed the importance of protecting student First Amendment rights in *Circle School v. Phillips,* 270 F.Supp.2d 616 (E.D.Pa.), *aff'd,* 381 F.3d 172, 181-82 (3d Cir.2004), in which it struck a state statute that required parental notification when a student refused to recite the pledge of allegiance or to salute the flag. *Circle School* reasoned that the parental notice provision would unduly "chill" students' exercise of their First Amendment right to refrain from pledge recitation, rejecting the proffered justification that the notification procedure was merely an administrative action designed to appraise parents of their children's activities during the school day. *Id.* This Court disagrees with *Circle School's* holding that such reports

to parents would chill First Amendment freedoms; a school notifying a parent of a child's activities during the school day is unremarkable. While the Court disagrees as to the constitutionality of the statute in *Circle School,* the statute at issue here is far more restrictive. *Circle School* students were still allowed to make their own decision whether to recite the pledge, whereas the statute here is more restrictive in that it robs the student of the right to make an independent decision whether to say the pledge. Since *Barnette,* federal courts have established a body of caselaw that irrefutably recognizes the right of students to remain silent and seated during the pledge. *See Walker-Serrano ex rel. Walker v. Leonard,* 325 F.3d 412, 417 (3d Cir.2003) ("For over fifty years, the law has protected elementary students' rights to refrain from reciting the pledge of allegiance to our flag. Punishing a child for non-disruptively expressing her opposition to recitation of the pledge would seem to be as offensive to the First Amendment as requiring its oration.") (citation omitted); *Rabideau v. Beekmantown Central School District,* 89 F.Supp.2d 263, 267 (N.D.N.Y.2000) ("It is well established that a school may not require its students to stand for or recite the Pledge of Allegiance or punish any student for his/her failure to do so."); *Lipp v. Morris,* 579 F.2d 834, 836 (3d Cir.1978) (declaring a New Jersey statute requiring students "to show full respect to the flag while the pledge is being given merely by standing at attention" unconstitutional); *Goetz v. Ansell,* 477 F.2d 636, 637-38 (2d Cir.1973) (holding that a student has the right to remain quietly seated during the pledge of allegiance and cannot be compelled to leave the room if he chooses

not to stand); *Frain v. Baron,* 307 F.Supp. 27, 33-34 (E.D.N.Y.1969) (school is enjoined from "excluding [students] from their classrooms during the Pledge of Allegiance, or from treating any student who refuses for reasons of conscience to participate in the Pledge in any different way from those who participate.").

The State Defendants' efforts to distinguish these cases fall short in that they confuse capacity to sue requirements with substantive constitutional rights. The State Defendants argue that *Elk Grove Unified School District v. Newdow,* 542 U.S. 1, 124 S.Ct. 2301 (2004) supplants the longstanding constitutional rule that students may refrain from reciting the pledge. In *Newdow,* elementary teachers in the Elk Grove Unified School District ("Elk Grove District") led their students in reciting the pledge each morning. *See id.* at 4-5, 124 S.Ct. at 2305. Newdow, an atheist, non-custodial father of a kindergarten student, brought a mandamus action as his child's next friend, seeking a declaration that the language "under God" violated the Establishment and Free Exercise clauses of the Constitution, as well as an injunction against the Elk Grove District's policy of daily pledge recitation. *See id.* at 8, 124 S.Ct. at 2306. Newdow contended that his child's daily pledge recitation interfered with his "unrestricted right to inculcate in his daughter-free from governmental interference-the atheistic beliefs he finds persuasive." *Id.* at 15, 124 S.Ct. at 2310. Fatal to Newdow's case, however, was that the child's mother was the custodial parent entrusted with making decisions about the child's legal interests, education and welfare. *See id.* at 10, 124 S.Ct. at 2307. Accordingly, the Court held that Newdow lacked

standing to bring this action as his child's next friend. *See id.* at 17-18, 124 S.Ct. at 2312.

The State Defendants contend that *Newdow* stands for the proposition that a child's Pledge participation is a function of a custodial parent or legal guardian's conviction, not the child's. *Newdow* says nothing that supports the State defendants' novel legal assertions, however. Indeed, *Newdow* explicitly recognizes that ability of a *student* to assert constitutional rights against a third party through an action filed by the appropriate next friend. *See id.* at 17, 124 S.Ct. at 2312. Newdow simply lacked standing to serve as his child's next friend. The Court even went on to stress the importance of preserving the child's right to free expression in the context of pledge recitation, noting that "the interests of this parent and this child are not parallel and, indeed, are potentially in conflict," explaining that the child's mother "tells us that her daughter has no objection to the Pledge, and we are mindful in cases such as this that 'children themselves have constitutionally protectible interests.'" *Id.* at 15, n. 7, 124 S.Ct. at 2311.

Although the plaintiffs in *Barnette, Banks* and *Holloman* were the students' parents acting as their next friends, the next friend mechanism was necessary in those cases because of the students' lack of capacity to sue due to nonage, not because they lacked independent First Amendment rights. Had the parents opposed the students' assertion of their rights, the Federal Rules of Civil Procedure provide the mechanism for the student to vindicate his or her own rights. Pursuant to Rule 17(c), the Court must appoint

a guardian ad litem or must make "such other order as it deems proper for the protection of the infant." Fed.R.Civ.P. 17(c). Yet because the rule is permissive, not mandatory, a court may allow a child to sue with or without a guardian or next friend. *See Jacobs v. Board of School Com'rs,* 490 F.2d 601, 604 (7th Cir.1973) (First Amendment challenge by students to school rules on distribution of written materials on school property), *vacated as moot,* 420 U.S. 128, 129, 95 S.Ct. 848, 850 (1975).

This Court addressed this issue in *Gonzalez ex rel. Gonzalez v. Reno,* 86 F.Supp.2d 1167 (S.D.Fla.2000), *aff'd,* 212 F.3d 1338 (11th Cir.2000). Elian Gonzalez's maternal relatives sued the Immigration and Naturalization Service ("INS") as his next friend, alleging both constitutional and statutory claims despite his father's objection to the relief sought. This Court ruled:

> A plaintiff's age is not determinative of standing; children possess certain personal rights that are enforceable in federal court. This is not to say, however, that children necessarily have the capacity to sue on their own behalf. Rule 17(c) of the Federal Rules of Civil Procedure provides mechanisms by which a child who has standing, but who is too young to have capacity to sue, can bring suit through a representative. In this case, the six-year-old Plaintiff alleges that he wants the INS to process applications seeking political asylum for

> him in the United States despite his father's protestations. To that end[,] Plaintiff brings this suit by and through a purported next friend, pursuant to Rule 17(c). To be clear[,] Plaintiff's standing is a distinct inquiry from that of Lazaro Gonzalez's capacity to act as Plaintiff's next friend.

Gonzalez, 86 F.Supp.2d at 1180-81 (S.D.Fla.2000) (footnotes and citations omitted). Elian's father intervened on appeal and asked to be substituted as his son's next friend. The Eleventh Circuit allowed the maternal family to remain as next friend, even though the father objected:

> Also before this Court is a recently filed motion of Intervenor, Juan Miguel Gonzalez, to remove Lazaro Gonzalez as Plaintiff's next friend and to substitute Plaintiff's father as next friend. Notwithstanding that much has happened since Lazaro brought this suit as Plaintiff's next friend, Lazaro (aided by a troop of seasoned lawyers) has completely and steadfastly pressed Plaintiff's claimed rights in the district court and in this Court. We see no powerful reason to make a change at this point. We, therefore, deny Intervenor's motion to remove Lazaro and to substitute Intervenor as next friend for the purposes of this litigation.

Gonzalez, 212 F.3d at 1346, n. 7. *See also Ad Hoc*

Committee of Concerned Teachers on Behalf of Minor and Under-Age Students Attending Greenburgh Eleven Union Free School Dist. v. Greenburgh No. 11 Union Free School Dist., 873 F.2d 25, 29-30 (2d Cir.1989) ("Even though the infant or incompetent has a general representative, if the representative is unable or refuses to act or his interests conflict with the person represented, the infant or incompetent may sue in federal court by his next friend or by a guardian ad litem. Courts have always had the power to appoint special representatives under such circumstances, and this power should be considered retained by the federal court in Rule 17(c)"). A student's lack of capacity to sue due to age is easily remedied through Rule 17(c) and is unrelated to the ability of a student to assert his or her own constitutional rights.

The Court does recognize that parents have a fundamental right to control the upbringing of their children. *See Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442 (1944) (it is a "cardinal" principle that "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder"); *Troxel v. Granville,* 530 U.S. 57, 66, 120 S.Ct. 2054, 2060 (2000) ("it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children"). The right of parents and guardians to direct the education of their children is similarly well-recognized. *See Meyer v. State of Nebraska,* 262 U.S. 390, 400, 43 S.Ct. 625, 627 (1923) (parents have fundamental right to have their

children taught in German); *Pierce v. Society of Sisters,* 268 U.S. 510, 534-35, 45 S.Ct. 571, 573 (1925) (invalidating an Oregon statute requiring parents to send their children to public school, holding that the statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."); *Wisconsin v. Yoder,* 406 U.S. 205, 232-33, 92 S.Ct. 1526, 1541-42 (1972) (Amish children need not attend public school past eighth grade, as parental liberty to direct the education of their children is fundamental). Yet this right does not translate into a requirement that a parent must give prior approval of a child's exercise of First Amendment rights in a school setting. Were such the case, all the previously cited pledge cases would have so held, as the recognition of parental rights in the educational sphere predated *Barnette* by decades. "Pledge autonomy" has been the state of the law for over 60 years; it is the State Defendants who attempt to create a new rule of constitutional law by requiring prior parental approval of the exercise of First Amendment rights in a school setting.

Fl. Stat. ¶ 1003.44(1), to the extent that it requires a student to obtain a parent's permission to be excused from reciting the pledge of allegiance and requires a student to stand during the pledge of allegiance, is unconstitutional on its face and as applied to Frazier in violation of his First and Fourteenth Amendment rights.

D. Relief to be Awarded

Whereas the Court has found the statute unconstitutional on its face and as applied to Frazier, Frazier is entitled to the following relief against the School Defendants pursuant to the Consent Order: The School Defendants, and anyone acting in concert with them, are permanently enjoined from enforcing any District custom or practice that requires a student to obtain a parent's permission before being excused from reciting the pledge of allegiance or that requires a student to stand during the pledge of allegiance. The District shall rescind any custom or practice that requires a student to obtain a parent's permission before being excused from reciting the pledge of allegiance or that requires a student to stand during the pledge of allegiance, including references to that policy in its Student and Family Handbook. The District shall also communicate such rescission to all employees of the School District and will specifically instruct its employees that no student may be disciplined in any way for not reciting the pledge of allegiance or for sitting quietly during the pledge of allegiance. The School Board need not otherwise refrain from disciplining a student for disruptive conduct. Finally, the School Defendants, and anyone acting in concert with them, are permanently enjoined from enforcing Fla. Stat. § 1003.44(1) to the extent that it requires a student to obtain a parent's permission before being excused from reciting the pledge of allegiance and require a student to stand during the pledge of allegiance. As to other relief, the District shall issue, and Alexandre shall accept or not contest, a reprimand with written notation in connection with the

above-described incident. Finally, judgment to Frazier shall be paid by the School Board in the amount of thirty two thousand five hundred dollars ($32,500.00) in full satisfaction of his claim for any and all damages, attorneys' fees and costs against the School Defendants.

As to the State Defendants, their motion to dismiss is denied. The State Defendants take issue with Frazier's request for "retrospective" relief on sovereign immunity grounds, but Frazier seeks retrospective relief only in the form of a declaration that his rights were violated. All other relief sought against the State Defendants is declaratory and injunctive relief for the purpose of preventing future First Amendment violations.

IV. CONCLUSION

THE COURT, having considered both the parties' written submissions and oral arguments, hereby

ORDERS AND ADJUDGES that the State Defendants' and Alexandre's Motion to Dismiss, February 9, 2006 **[DE 31]** is DENIED. Frazier, the State Defendants and Alexandre shall submit a Joint Proposed Scheduling Order and Proposed Scheduling Order within ten (10) days of the date of this Order. It is also

ORDERED AND ADJUDGED that Frazier's Motion for Judgment on the Pleadings, treated here as a motion for summary judgment, filed February 21, 2006 **[DE 32]** is GRANTED. Frazier is entitled to the relief set forth herein as agreed to in the Consent

Order. An order of final judgment shall issue separately at the conclusion of this litigation.

DONE AND ORDERED at Chambers at West Palm Beach, Florida, this 31st day of May, 2006.

/s KENNETH L RYSKAMP
UNITED STATES DISTRICT JUDGE

Copies provided:

All parties and counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 05-81142-CIV-Ryskamp/Vitunac

CAMERON FRAZIER, through his mother and next friend, Christine Frazier,

Plaintiff,

v.

CYNTHIA ALEXANDRE, individually; RICHARD POORMAN, individually, and in his official capacity as Assistant Principal of Boynton Beach Community High School; PALM BEACH COUNTY SCHOOL DISTRICT BOARD; JOHN WINN, in his official capacity as Commissioner of the Florida Department of Education; F. PHILIP HANDY, in his official capacity as Chairman of the Florida State Board of Education; and DONNA CALLAWAY, T. WILLARD FAIR, ROBERTO MARTINEZ, PHOEBE RAULERSON, LINDA TAYLOR, and KATHLEEN SHANAHAN, in their official capacities as members of the Florida State Board of Education,

Defendants.

CONSENT ORDER

This Order is entered upon consent of plaintiff and defendants Alexandre, Poorman and Palm Beach County School District Board ("school defendants"). This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343(a)(4), and 1367. This Order is entered to set forth a framework to obtain a full and final resolution of the claims brought by plaintiff against the school defendants. This Order does not involve defendants Winn, Handy, Callaway, Fair, Martinez, Raulerson, Taylor, and Shanahan ("state defendants").

I. PARTIES.

Plaintiff Cameron Frazier is an eleventh grade student at Boynton Beach Community High School, Palm Beach County School District.

Defendant Cynthia Alexandre is a math teacher at Boynton Beach Community High School. She is sued in her individual capacity.

Defendant Richard Poorman is an assistant principal of Boynton Beach Community High School, vested with the authority to discipline students. He is sued in both his individual and official capacities.

Defendant Palm Beach County School District is a public entity created by Fla. Stat. §1001.30. The District is governed by the Palm Beach County School District Board which is subject to suit pursuant to Fla. Stat. §1001.41(4).

Defendant John Winn is the Commissioner of

the Florida Department of Education. Pursuant to Fla. Stat. §1001.10, the Commissioner of Education is the chief educational officer of the State of Florida, and is responsible for giving full assistance to the State Board of Education in enforcing compliance with state polices regarding education. Defendant Winn is sued in his official capacity for declaratory and injunctive relief only.

Defendant F. Philip Handy is the Chairman of the Florida State Board of Education. Defendants Donna Callaway, T. Willard Fair, Roberto Martinez, Phoebe Raulerson, Linda Taylor, and Kathleen Shanahan, are members of the Florida State Board of Education. The State Board of Education is a body corporate pursuant to Fla. Stat. §1001.01(1). One of the duties of the State Board of Education is "to enforce system wide education goals and policies." Fla. Stat. §1001.02(2)(r). The State Board of Education is specifically charged with enforcing compliance with law by all school districts in the State of Florida. Fla. Stat. §1001.03(8). The Chairman and members of the Florida State Board of Education are sued in their official capacities for declaratory and injunctive relief only.

II. THE DISPUTE.

Because of his personal political beliefs and convictions, Cameron Frazier does not want to recite, or stand during, the pledge of allegiance each morning. Rather, Cameron has generally remained quietly seated during the pledge and has not disturbed or interfered with other students reciting the pledge.

On December 8, 2005, Cameron was in his

fourth period class, taught by Defendant Alexandre, when the pledge of allegiance was to be recited. Ordinarily the pledge is recited earlier in the day and this was the first time that it was recited while Cameron was in Defendant Alexandre's class. When Cameron did not stand for the pledge of allegiance, he was instructed by Defendant Alexandre to do so. Ultimately, Cameron was removed from the class, taken to the assistant principal's office and initially instructed that while he could be excused from reciting the pledge of allegiance upon written request by a parent, he would be required to stand during the pledge of allegiance.

For purposes of this lawsuit only, Defendant Palm Beach County School District Board, normally following Fla. Stat. §1003.44(1), has a custom or practice mandating that students, unless excused by written request of a parent, recite the pledge of allegiance. The custom or practice further requires that students, even if excused from reciting the pledge, must stand at attention while the pledge is recited.

Plaintiff claims that these customs or practices, and the state statute upon which they are based, are in clear violation of the First and Fourteenth Amendments to the United States Constitution. The School Board agrees, for purposes of this lawsuit only, that such customs or practices are sufficient to subject it to liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), if plaintiff is correct in his constitutional claims. While Defendant Palm Beach County School District Board has the authority to rescind its own customs or practices, it cannot alter

Fla. Stat. 1003.44(1). Moreover, the School District Board asserts that it must presume the constitutionality of the statute in the absence of a court decision holding otherwise. Thus, without the Court's analysis of the constitutionality of the state statute, these parties cannot resolve this case. These parties desire to reach a final resolution of this case in an expeditious manner without the need for protracted litigation.

III. PROPOSED FRAMEWORK FOR RESOLUTION OF CASE BASED UPON COURT'S DETERMINATION OF CONSTITUTIONALITY OF FLA. STAT. 1003.44(1).

These parties believe that the constitutionality of Fla. Stat. 1003.44(1) is dispositive of Plaintiff's claims. For purposes of this lawsuit only, if the statute is unconstitutional, the School Board's customs or practices based upon the statute are likewise unconstitutional. These parties have further agreed upon the relief to be granted based upon the Court's determination of that issue.

For purposes of this lawsuit only and for purposes of deciding the constitutionality of the statute, the school defendants stipulate to the facts plead in the First Amended Complaint as to them and agree that the case may be resolved by a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), without the need for an Answer to be filed. If the Court concludes that it cannot resolve this case on the pleadings, defendants will not be bound by its stipulation to the facts and may file an Answer.

Contingent upon a finding by the Court for plaintiff that Fla. Stat. §1003.44(1), to the extent that it requires a student to obtain a parent's permission before being excused from reciting the pledge of allegiance and requires a student to stand during the pledge of allegiance, is unconstitutional on it face and as applied to Plaintiff, in violation of his First and Fourteenth Amendment rights, these parties agree to the following relief:

A. DECLARATORY RELIEF DECLARING THAT:

1. Fla. Stat. §1003.44(1), to the extent that it requires a student to obtain a parent's permission before being excused from reciting the pledge of allegiance and requires a student to stand during the pledge of allegiance, is unconstitutional on it face and as applied to Plaintiff, in violation of his First and Fourteenth Amendment rights.

2. Defendant SCHOOL BOARD's customs or practices, to the extent that they require a student to obtain a parent's permission before being excused from reciting the pledge of allegiance and require a student to stand during the pledge of allegiance, are unconstitutional on their face and as applied to Plaintiff, in violation of his First and Fourteenth Amendment rights.

B. INJUNCTIVE RELIEF ORDERING THAT:

1. The school defendants, and anyone acting in concert with them, are permanently enjoined from enforcing any School District custom or practice that requires a student to obtain a parent's permission

before being excused from reciting the pledge of allegiance or that requires a student to stand during the pledge of allegiance.

2. Defendant SCHOOL BOARD shall rescind any custom or practice that requires a student to obtain a parent's permission before being excused from reciting the pledge of allegiance or that requires a student to stand during the pledge of allegiance, including references to that policy in its Student and Family Handbook.

3. Defendant SCHOOL BOARD shall communicate such rescission to all employees of the School District and will specifically instruct its employees that no student may be disciplined in any way for not reciting the pledge of allegiance or for sitting quietly during the pledge of allegiance. This does not preclude the School Board from disciplining a student for disruptive conduct.

4. The school defendants, and anyone acting in concert with them, are permanently enjoined from enforcing Fla. Stat. §1003.44(1) to the extent that it requires a student to obtain a parent's permission before being excused from reciting the pledge of allegiance and require a student to stand during the pledge of allegiance.

C. OTHER RELIEF:

1. The School District shall issue, and defendant Alexandre shall accept or not contest, a reprimand with written notation in connection with the above-described incident.

2. Judgment to plaintiff to be paid by the School

Board in the amount of thirty two thousand five hundred dollars ($32,500.00) in full satisfaction of his claim for damages, attorneys' fees and costs against the school defendants.

IV. ORDER:

Upon consideration of the foregoing agreed framework for resolution of plaintiff's claims against the school defendants, the Court approves that framework.

IT IS ORDERED THAT the facts set forth in plaintiff's First Amended Complaint as to the school defendants are deemed admitted by the school defendants for the purposes of this lawsuit only and that no Answer need be filed by any of them.

IT IS FURTHER ORDERED THAT Plaintiff, within ten (10) days of the entry of this order, shall submit his motion for judgment on the pleadings, together with a memorandum in support.

IT IS FURTHER ORDERED THAT the school defendants, within twenty (20) days of the filing of plaintiff's motion, shall either file a response or a notice that they do not intend to respond to plaintiff's motion.

IT IS FURTHER ORDERED THAT a copy of this Consent Order, and a copy of plaintiff's motion for judgment on the pleadings and memorandum in support, shall be served by plaintiff upon the Attorney General for the State of Florida and the state defendants. The Court intends to rule on plaintiff's challenge to the constitutionality of Fla. Stat.

§1003.44(1) and invites the Attorney General for the State of Florida and the state defendants to defend Fla. Stat. §1003.44(1) as challenged by plaintiff. The Attorney General and the state defendants are hereby given twenty (20) days from the filing of plaintiff's motion to respond to plaintiff's motion if the State of Florida wishes to be heard in this action.

SO ORDERED this 6 day of February, 2006.

/s KENNETH L RYSKAMP

Kenneth L. Ryskamp
Senior United States District Court
Judge

Agreed as to form and substance:

s/Randall C. Marshall
Randall C. Marshall, Esq.
ACLU Foundation of Florida, Inc.
4500 Biscayne Blvd. Ste 340
Miami, FL 33137-3227
Florida Bar No: 181765
rmarshall@aclufl.org
(305) 576-2337
(786) 363-1108 (facsimile)

James K. Green, Esq.
JAMES K. GREEN, P.A.
Suite 1650, Espearantè
222 Lakeview Ave.
West Palm Beach, FL 33401
Florida Bar No: 229466
jameskgreen@bellsouth.net

(561) 659-2029
(561) 655-1357 (facsimile)

Attorneys for Plaintiff

s/Gerald A. Williams
Gerald A. Williams, Chief Counsel
THE SCHOOL DISTRICT OF PALM BEACH COUNTY
Office of the Chief Counsel
P.O. Box 19239
West Palm Beach, FL 33416-9239

Counsel for Defendants Poorman and School Board

s/Michael R. Holt
Michael R. Holt, Esq.
RUMBERGER, KIRK & CALDWELL
P.O. Box 3390
Tampa, FL 33601-3390
Counsel for Defendant Cynthia Alexandre

(3)

Supreme Court, U.S.
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No. 08-1351

In the Supreme Court of the United States

CAMERON FRAZIER,

Petitioner,

v.

DR. ERIC J. SMITH, COMMISSIONER, FLORIDA DEPARTMENT OF EDUCATION, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR STATE RESPONDENTS IN OPPOSITION

BILL MCCOLLUM
Attorney General
State of Florida
Scott D. Makar*
Solicitor General
Timothy D. Osterhaus
Deputy Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399
(850) 414-3681
(850) 410-2672 (fax)
*Counsel of Record

QUESTION PRESENTED

(Restated)

Whether a state statute requiring parental consent for minor students in public elementary, middle and high schools to be excused from a classroom Pledge of Allegiance recitation is facially unconstitutional?

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, *Frazier v. Winn,* is reproduced in the Petitioner's Appendix ("Pet. App.") at 20a and is reported at 535 F.3d 1279 (11th Cir. 2008). The order of that court denying *en banc* review is reported at *Frazier v. Winn,* 555 F.3d 1292 (11th Cir. 2009). *See* Pet. App. at 1a. The district court's order granting summary judgment for Petitioner Frazier and denying State Defendants' (now Respondents') motion to dismiss is reported at *Frazier v. Alexandre,* 434 F.Supp.2d 1350 (S.D. Fla. 2006). *See* Pet. App. at 38a.

JURISDICTION

The court of appeals issued its opinion on July 23, 2008, and denied the petition for rehearing en banc on January 26, 2009. Pet App. at 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000).

PROVISIONS INVOLVED

The First Amendment to the United States Constitution, which this Court has ruled to be incorporated as to the states through the Fourteenth Amendment, provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech."

Section 1003.44(1), Florida Statutes, is reproduced as follows:

> (1) Each district school board may adopt rules to require, in all of the schools of the district,

programs of a patriotic nature to encourage greater respect for the government of the United States and its national anthem and flag, subject always to other existing pertinent laws of the United States or of the state. ... The pledge of allegiance to the flag, "I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all," shall be rendered by students standing with the right hand over the heart. The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state. Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge. Upon written request by his or her parent, the student must be excused from reciting the pledge. When the pledge is given, civilians must show full respect to the flag by standing at attention, men removing the headdress, except when such headdress is worn for religious purposes, as provided by Pub. L. ch. 77-435, s. 7, approved June 22, 1942, 56 Stat. 377, as amended by Pub. L. ch. 77-806, 56 Stat. 1074, approved December 22, 1942.

STATEMENT

This case involves solely the facial constitutionality of section 1003.44(1), Florida Statutes, which provides that the Pledge of Allegiance shall be recited at the start of each day in all public elementary, middle and high schools. Each public school student, from kindergarten to twelfth grade, is required to recite the Pledge, but is informed via a posted notice of the right not to participate, provided a parent provides a written request excusing the student.

On December 8, 2005, a Florida high school applied the statute to the Petitioner, Cameron Frazier ("Frazier"), an eleventh grader, in an unacceptable manner. Ordinarily, the Pledge of Allegiance is recited at Frazier's high school early in the day. Pet. App. at 42a. On this day, however, the Pledge was to be recited during the fourth period when Frazier was in math class. *Id.* As a result, this was the "first time the recitation" was to occur when Frazier was in his math teacher's class. *Id.* When Frazier explained he did not participate in the Pledge, the teacher berated him, belittled his viewpoint, questioned his patriotism, generally humiliated him in front of his class, and ordered him to the principal's office where he remained for the remainder of the class period. *Id.* at 43-44a. The vice principal gave Frazier a copy of the school policy and a consent form, and spoke to Frazier's mother. *Id.* at 44a. He was told he would be required to stand during the Pledge even if his mother excused him from its recitation. *Id.*

Frazier sued. Through his mother, his complaint challenged the constitutionality of the school's action as applied to him as well as the facial validity of the statute generally. *Id.* at 45a. His as-applied claims were quickly resolved by a consent order to which the school defendants had agreed.[1] *Id.* at 77a. Despite prevailing on his as-applied claims, Frazier continued to press a facial challenge to the statute against state education officials. *Id.* at 47-48a. He challenged on its face the statute's requirement that a student obtain parental consent before being excused from participation as well as the clause requiring "civilians" to stand during the Pledge. *Id.*

State education officials defended the facial validity of the statute's parental consent provision, an issue that threatened its systemic philosophy to leave substantive curricular decisions to parents or schools, generally not leaving school children to act alone.[2] *Id.* at 61a.

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[1] The *school* defendants did not contest the matter and jointly moved with Frazier for a consent order on the as-applied claims against them, which the district court entered. *See* Pet. App. 77a. The *state* defendants, however, were not party to the consent order, which encompassed only the as-applied claims against the local school defendants. *Id.*

[2] The state also argued that the statute's "civilians" standing provision (last sentence of the statute) should not be disturbed because it does not clearly apply to "students" in view of various legislative alterations through the years that distinguished the statute's references to "students" from "civilians" (*see Clark v. Martinez*, 453 U.S. 371, 380-81 (2005) (noting that non-problematic interpretations should be preferred)) and because the statute itself directs schools to conform their requirements to "existing pertinent (Continued ...)

The district court ruled for Frazier, holding that the Pledge statute's parental consent requirement "robs the student of the right to make an independent decision whether to say the pledge." *Id.* at 67a. The district court, citing *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), concluded that "'Pledge autonomy' [of minor school children] has been the state of the law for over 60 years." *Id.* at 73a. Having concluded that parental consent plays no role and is constitutionally impermissible in the context of the Pledge of Allegiance, the district court invalidated the statute on its face.

The State appealed, arguing that the district court erred in facially striking down the statute. The State did not contest that the statute was applied unconstitutionally to Frazier.[3] *Id.* at 20a *et seq.* Instead, it disputed the district court's conclusion that minor students have a constitutional right – regardless of their age or grade level – to decide autonomously whether to

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laws of the United States." Fla. Stat. § 1003.44(1). The state conceded that courts had long settled that excused students need not stand for the Pledge (contrary to the local school's action in forcing Frazier to stand after his mother consented to his excusal). Both the district and circuit courts, however, decided to invalidate and sever the civilians standing portion of the statute, believing its application to students to be "the most probable, accurate interpretation." Pet. App. at 25a. Frazier has not challenged that portion of the circuit court's opinion.

[3] The Eleventh Circuit's opinion noted that Frazier's as-applied case was not before it. Pet. App. at 23a n.2.; *see also, supra,* note 1 (discussing the consent order entered on Frazier's as-applied claims).

recite the Pledge, a right that is always superior to their parents' fundamental right to guide their upbringing and education. *Id.*

The Eleventh Circuit reversed, upholding the facial constitutionality of the parental consent provision. *Id.* at 20a. The circuit court viewed Frazier's challenge to be materially different from all previous Pledge cases (such as *Barnette*), which did not involve the constitutional rights of parents or a parental consent provision like the one at issue. *Id.* at 29a. The court recognized that, unlike *Barnette*, which involved *governmental* compulsion of student participation, Florida's statute is neutral by deferring to *parental* wishes. *Id.* at 30a. The statute recognizes and balances the rights of minor students and their parents by requiring that students receive notice at school of their right to be excused from Pledge participation via a simple parental consent form. *Id.* at 29a. Because the statute permits only a *parent* (rather than the *government*) to override its child's preference, it is a permissible restriction in light of the constitutional right of parents to govern their children's education. *Id.* at 29-31a (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); & *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

Finally, the circuit court's opinion left open the possibility that a mature high school student could be treated differently in a context where the balance of parental, student, and school rights favors him in a specific situation. Pet. App. at 31a. It declined to facially invalidate Florida's statute on substantial overbreadth grounds, however, given the "number of instances –

particularly those instances involving elementary and middle school students – relative to the total number of students covered by the statute." *Id.* at 31-32a.

Frazier sought rehearing en banc, which was denied. *Id.* at 1a. Judge Rosemary Barkett issued a lengthy dissent from this denial, joined by no other judge, which largely tracked the district court's rationale and view that *Barnette* governed the outcome of this case. *Id.* at 3a.

ARGUMENT

The Eleventh Circuit's opinion does not warrant review because it does not contradict a precedent of this Court, create a conflict with decisions of other circuit courts, or raise an issue of national importance that justifies this Court's review.

I. The Eleventh Circuit's Decision Does Not Conflict With a Precedent of this Court.

The primary theme underlying Frazier's petition is that Florida's Pledge statute conflicts with this Court's decision in *Barnette,* which Frazier claims established an independent constitutional right for public school students – from kindergarten to twelfth grade – to refuse to participate in the Pledge even over parents' objections. In Frazier's view, *Barnette* established this broad right for minors of all ages, and wholly insulated and divorced it from the established constitutional right of parents to control their children's upbringing.

This position overstates *Barnette*, as the Eleventh Circuit recognized, and would effectively overrule or undermine this Court's precedents that recognize the constitutional rights of parents to control the upbringing of their children. *See, e.g., Vernonia Sch. Dist. 47J*, 515 U.S. at 654-55; *Yoder*, 406 U.S. at 231-32; *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). Indeed, the interplay of parental and children's rights continues to be litigated in many contexts where parental rights repeatedly have been vindicated.[4]

Frazier claims that the State refuses to acknowledge that students have constitutional rights. The State, of course, recognizes that minors have constitutional rights, albeit more limited ones than adults, especially in the area of education. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969). The

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[4] *See, e.g., Winkelmen v. Parma City Sch. Dist.*, 550 U.S. 516, 529 (2007) (parents possess a "recognized legal interest in the education and upbringing of their child"); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 326 (2006) ("States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy, because of their strong and legitimate interest in the welfare of their young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."); *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (parents "retain a substantial, if not the dominant, role in the decision [whether child is committed to state mental hospital], absent a finding of neglect or abuse" despite minors' "substantial" liberty interests); *see also Arnold v. Bd. of Educ. of Escambia County, Ala.*, 880 F.2d 305, 313 (11th Cir. 1989) ("the parental right to structure the education ... of one's children" is constitutionally protected).

State's clear legal position is simply that minors' rights must be balanced against those of their parents and the interests of the government in the education context. Contrary to Frazier's assertions, the State is not claiming that students' constitutional rights are subordinate to those of their parents or the interests of the State in all cases. Instead, the State's position is that the *facial* invalidation of the parental consent statute would improperly fail to account for all three stakeholders: parents, children, and the school system. Frazier provides no explanation why each of these interests should not be recognized as legitimate, and balanced as in other constitutional litigation. He simply claims that students of all ages and grade levels have an independent, autonomous constitutional right to refrain from the Pledge that is superior to and that always trumps a parent's fundamental constitutional right to guide their upbringing, which this Court has never recognized.

Notably, the cases upon which Frazier relies involved solely *governmental* compulsion of the Pledge with no discussion of the *parental* interest involved in this appeal. This Court has distinguished governmental compulsion from the separate issue of parental control in the education context. *Yoder*, 406 U.S. at 230-31 (refusing to address Justice Douglas's dissenting view that children should have authority to decide their own educational fate even if contrary to parental wishes), & 243 (Douglas, J., dissenting) (noting that the issue of parental versus children's rights in the education context "has never been squarely presented before today ... we have in the past

analyzed similar conflicts between parent and State with little regard for the views of the child").

Barnette, for instance, involved a statute that provided no opt out from the Pledge and recognized no parental involvement or deference. Rather, West Virginia unconditionally required every student to recite the Pledge on pain of school discipline and possible criminal prosecution as well as jail time for their parents. 319 U.S. at 629. This Court repudiated the state's use of governmental power to compel civic orthodoxy among dissenting families in this manner.

Florida's law is very different and does not compel Pledge participation in this way. The "right" of students to opt out of the Pledge is explicit in the statute and must be "conspicuous[ly]" communicated by school officials to students. Fla. Stat. § 1003.44(1). A student needs only to provide a written request from a parent to be excused – a simple and familiar process in the school context. *See Croft v. Perry*, 604 F. Supp. 2d 932, 941 (E.D. Tex. 2009) (ruling that Texas had "followed Supreme Court precedent" in *Barnette* by providing that a student could opt out of the Pledge via a parent's request).

The student speech rights recognized in *Tinker* also have little bearing here. Florida's Pledge statute does not affect *Tinker*-like displays and extra-curricular speech; instead, it applies in one narrow aspect of the student's core educational experience.[5]

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[5] This Court has noted the Pledge's educational value. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6-7 (2004) (Pledge (Continued ...)

Furthermore, it functions no differently than other portions of Florida's education code that require parental input where a minor would opt out of curricular exercises. *See* Fla. Stat. § 1002.20(2)(a) (consent required to terminate school enrollment at age 16); Fla. Stat. § 1002.20(2)(c) (consent required for excusal for religious instruction and holidays); Fla. Stat. § 1003.42(3) (parental consent required to opt out of health/sex education classes); Fla. Stat. § 1003.421(4) (consent required to excuse a student from reciting the Declaration of Independence); Fla. Stat. § 1003.47(1)(c) (consent required to opt out of certain science classes).[6]

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is "a common public acknowledgement of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles. ... [and, together with the flag, stands] as a symbol of our Nation's indivisibility and commitment to the concept of liberty"); *Ambach v. Norwick*, 441 U.S. 68, 78 n.8 (1979) ("Flag and other patriotic exercises [promote] loyalty, ... a characteristic of citizenship essential to the preservation of a country."); *Barnette*, 319 U.S. at 631 (recognizing Pledge's role in the mission to "educat[e] the young for citizenship" and that "the State may require teaching by instruction and study of ... the guaranties of civil liberty which tend to inspire patriotism and love of country"); *see also* Fla. Stat. § 1003.42(2)(a)-(e) (detailing more broadly Florida's commitment to nation and patriotism-related instruction, including "flag education").

[6] Other Florida laws demonstrate the same policy of requiring parental involvement in the substantial decisions of minors, even where constitutional rights may be implicated. *See, e.g.*, Fla. Stat. § 390.01114(3) (parental notice required prior to a minor's abortion); Fla. Stat. § 741.04(1) (consent required to marry); Fla. Stat. § 800.04 (consent required to have sexual intercourse with an adult); Fla. Stat. § 1002.20(3)(e) (consent required to receive school contraceptive services); *see also* Fla. Stat. § 322.09 (consent (Continued ...)

Frazier also cites this Court's decision in *Newdow*, 542 U.S. 1 (Pet. 13), which actually weighs in Florida's favor. There, a non-custodial father brought an Establishment Clause challenge to the "under God" language of the Pledge. The minor student herself professed no objection to the Pledge language or to participating in the Pledge. 542 U.S. at 9. Nevertheless, the minor's own conviction had no apparent bearing on the outcome in which this Court focused on which *parent* had authority over the child's welfare. *Id.* at 15 n.7. Under Frazier's theory, the parental standing issue would have been irrelevant in view of the child's independent, autonomous right to make her own Pledge decision.

Finally, given the special relationship between parents and schools, schools may carry out parental decisions involving children, even where the state might be powerless to act on its own. *Cf. Parham*, 442 U.S. at 605 (affirming a state's *parens patriae* authority even though infringing "substantial" liberty interests of children). Thus, the Eleventh Circuit's opinion comports with this Court's previous decisions.

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required to obtain a driver's license); Fla. Stat. § 381.0041 (consent required to donate body parts); Fla. Stat. § 381.89(7) (consent required to use a tanning facility); Fla. Stat. ch. 743 (consent required to enter contracts); Fla. Stat. § 877.04 (consent required to get a tattoo); Fla. Stat. § 877.22 (consent required to be in public places during certain hours).

II. The Eleventh Circuit's Decision Creates No Conflict With Other Circuit Courts.

The Eleventh Circuit's opinion does not conflict with decisions of other circuit courts, including *The Circle School v. Pappert*, 381 F.3d 172 (3d Cir. 2004). Both cases involve state Pledge of Allegiance statutes, but the substantive terms of the statutes and the grounds for the circuit courts' respective decisions are markedly different.

Unlike Florida's Pledge statute, the Pennsylvania statute in *Circle School* left complete discretion to minor students to make their own Pledge decision. Parents had no say in the decision. The statute, however, required schools to notify parents if their child chose not to say the Pledge. The Third Circuit invalidated the notification requirement, holding it was impermissible viewpoint discrimination because it was triggered only when a student made a decision not to participate. *Id.* at 181. No such notification requirement or viewpoint discrimination is at issue here.

Notably, the district court below viewed *Circle School* as fundamentally different from the instant matter. While disapproving Florida's parental consent statute, the district court opined that Pennsylvania's statute passed constitutional muster. Pet. App. at 67a. The Eleventh Circuit did not even mention the Third Circuit opinion, perhaps because Frazier's answer brief did not discuss or rely upon any comparison between its case and *Circle School*. *See* Pet. App. at 20a *et seq.* In short, the Eleventh Circuit decided a different substantive legal question than that considered in *Circle School* such that no conflict exists.

III. The Eleventh Circuit's Decision Is Not One of Nationwide Importance that Justifies This Court's Review.

Finally, the Eleventh Circuit's decision does not address an issue of nationwide importance that justifies this Court's review. The decision merely allows the statute to remain operative while allowing for case-by-case adjudication of as-applied challenges where justified, as in Frazier's case against the school defendants.

Two states have statutes similar to Florida's that provide, as a general matter, for parental consent in the Pledge context.[7] No indication exists that the narrow parameters of the issue presented (facial validity of Florida's statute) involves a widespread concern in Florida or these other states, much less an issue of national importance.

Notably, each state has parental consent requirements related to many questions that arise in a child's school experience. These questions span the gamut from important curricular decisions about what classes parents allow their children to take (or to not take) to whether parents consent to the school infirmary dispensing an aspirin tablet to an ill child. As this Court has repeatedly noted, consistent with the Eleventh Circuit's conclusion, parental consent in the education context plays a well-accepted and critical role in effectuating the constitutionally protected right of

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[7] *See* Tex. Educ. Code § 25.082(b)-(c); Utah Code Ann. § 53A-13-101.6(3).

parents in the upbringing of their children. *See Vernonia Sch. Dist. 47J*, 515 U.S. 646; *Yoder*, 406 U.S. 205; *Pierce*, 268 U.S. 510; *Meyer*, 262 U.S. 390. The decision below simply recognizes the constitutional rights of parents, preserving the statute's facial constitutionality, yet leaving open the possibility of individual adjudication of as-applied claims. Under these circumstances, the issue presented does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BILL MCCOLLUM
Attorney General
State of Florida
Scott D. Makar*
Solicitor General
Timothy D. Osterhaus
Deputy Solicitor General
PL-01, The Capitol
Tallahassee, FL 32399
(850) 414-3681
(850) 410-2672 (fax)
Counsel for State Respondents

July 1, 2009

*COUNSEL OF RECORD

(4)

No. 08-1351

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CAMERON FRAZIER,

Petitioner,

—v.—

DR. ERIC J. SMITH, Commissioner,
Florida Department of Education, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION

JAMES K. GREEN
JAMES K. GREEN, P.A.
Suite 1650, Esperantè
222 Lakeview Avenue
West Palm Beach, Florida 33401
(561) 659-2029

RANDALL C. MARSHALL
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF FLORIDA, INC.
4500 Biscayne Blvd, Ste 340
Miami, Florida 33137-3227
(786) 363-2700

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REPLY

Petitioner Cameron Frazier submits this reply to clarify the status of the as-applied challenge in light of the Eleventh Circuit's decision. With respect to the arguments presented by the State Respondents, Petitioner believes that they are fully addressed in the Petition and that no reply to them is necessary.

I. THE STATUS OF THE AS-APPLIED CHALLENGE TO FLORIDA'S PLEDGE STATUTE.

A. The Consent Order Did Not Resolve The As-Applied Claims.

The State Respondents erroneously assert that Frazier's "as-applied claims were quickly resolved by a consent order to which the school defendants had agreed" and that "[d]espite prevailing on his as-applied claims, Frazier continued to press a facial challenge to the statute against state education officials." Response at p. 4 and n. 1.

The consent order, App. at 77a-86a, did not resolve any claims. Rather, the order set forth a procedural framework and a briefing schedule in order to resolve both the as-applied and facial challenges to the pledge statute. For purposes of deciding the constitutional claims, the school defendants stipulated to various facts and agreed that the claims could be decided as a matter of law. *See* App. at 48a, 79a-81a; Petition at pp. 5-6 and n. 4.

B. The Consent Order Invited The State To Defend The Pledge Statute.

The consent order further required notice to the Florida Attorney General – and the State Respondents – that the district court intended to rule on Frazier's constitutional challenge to the pledge statute and invited "the Attorney General for the State of Florida and the state defendants to defend Fla. Stat. §1003.44(1) as challenged by plaintiff." App. at 84a-85a.

The State Respondents accepted the district court's invitation and contested both the as-applied and facial challenges to the pledge statute. Both challenges were resolved by the district court's opinion granting summary judgment to Frazier against the School defendants and denying the State's motion to dismiss. App. at 38a-76a. The district court held that the pledge statute "to the extent that it requires a student to obtain a parent's permission to be excused from reciting the pledge of allegiance and requires a student to stand during the pledge of allegiance, is unconstitutional on its face and as applied to Frazier in violation of his First and Fourteenth Amendment rights." App. at 73a.

For the first time in this litigation, the State Respondents acknowledge that the statute was applied to Frazier "in an unacceptable manner." Response at p. 3. The State Respondents then assert that "[t]he State did not contest that the statute was applied unconstitutionally to Frazier." *Id.* at p. 5. While they did not appeal the district court's as-applied findings to the Eleventh Circuit, the State

Respondents contested Frazier's as-applied challenge in the district court. *See* App. at 51a-54a, 61a, 73a.

State Respondents also erroneously assert that Frazier's "mother consented to his excusal" from reciting the pledge of allegiance. Response at n. 2, p. 5. Frazier's mother did not consent.

In fact, the State argued in the district court that Frazier lacked standing to challenge the statute as applied because his mother had not consented to his being excused from reciting the pledge. *See* App. at 51a: "As to the as applied challenge, the State Defendants argue that the statute was never applied against Frazier because he did not have a parent's permission to be excused from reciting the pledge. The State Defendants also contend that Frazier's failure to seek parental permission renders his challenge moot." *See also* App. at 54a: "The State Defendants maintain that the as applied challenge is lacking because Frazier did not secure parental permission to be excused." These contentions were rejected by the district court. App. at 51a-61a. The district court specifically rejected the State Respondents' assertion that they could not be subject to an as-applied challenge and held that "Frazier may bring facial and as applied challenges as to all parts of the pledge statute." *Id.* at 61a.

C. The Consent Order Specified The Relief To Be Afforded Frazier From The School Defendants If His Constitutional Challenges Were Successful.

In the consent order, Frazier and the school

defendants agreed to the relief to be awarded "[c]ontingent upon a finding by the Court for plaintiff that Fla. Stat. §1003.44(1), to the extent that it requires a student to obtain a parent's permission before being excused from reciting the pledge of allegiance and requires a student to stand during the pledge of allegiance, is unconstitutional on it face and as applied to Plaintiff, in violation of his First and Fourteenth Amendment rights ... ." App. at 82a. Because of this contingency, and the Eleventh Circuit's reversal of the district court's finding of facial invalidity on the issue of parental consent, Frazier has not obtained any of the relief outlined in the consent order. *See* Petition at n. 6, pp. 7-8. Also as a consequence of the contingency and the Eleventh Circuit's reversal, the school defendants are no longer bound by their admissions in the consent order and the as-applied challenge to the parental consent requirement will have to be retried upon remand to the district court. *See* Petition at n. 8, pp. 8-9. Only the district court's finding that the pledge statute's requirement that students remain standing during the pledge, even those excused from reciting it, was unconstitutional as applied and on its face survives the Eleventh Circuit's decision. *See* App. at 24a-27a.

Only the facial challenge to Florida's parental consent requirement to be excused from reciting the pledge of allegiance is before this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

Randall C. Marshall
Counsel of Record
ACLU Foundation of
Florida, Inc.
4500 Biscayne Boulevard,
Suite 340
Miami, FL 33137-3227
(786) 363-2700
(786) 363-1108 (facsimile)

James K. Green, Esq.
JAMES K. GREEN, P.A.
Suite 1650, Esperante'
222 Lakeview Ave.
West Palm Beach, FL 33401
(561) 659-2029

Cooperating Attorney for
the ACLU Foundation of
Florida, Inc.

Attorneys for Cameron
Frazier

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No. 08-1351

In The
Supreme Court of the United States

CAMERON FRAZIER,

Petitioner,

v.

ERIC J. SMITH, COMMISSIONER,
FLORIDA DEPARTMENT OF EDUCATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF PUBLIC GOOD AND THE CENTER FOR CONSTITUTIONAL RIGHTS AS AMICI CURIAE IN SUPPORT OF PETITIONER

SETH E. MERMIN
Counsel of Record
THOMAS BENNIGSON
PUBLIC GOOD
3130 Shattuck Avenue
Berkeley, CA 94705
(510) 548-4064
Counsel for Amici Curiae

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INTEREST OF AMICI

Public Good and the Center for Constitutional Rights submit this brief as amici curiae in support of the Petition for Certiorari.[1]

Public Good is a public interest organization dedicated to the proposition that all people are equal before the law. Through amicus participation in cases of particular significance for freedom of speech, consumer protection and civil rights, Public Good seeks to ensure that the protections of the law remain available to all. The exercise of conscience that lies at the heart of this case exemplifies the rights that Public Good seeks to defend.

The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.

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[1] Pursuant to Rule 37.6 of this Court, amici state that no counsel for a party authored this brief in whole or in part, and that no person, other than amici, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief. Counsel of record received timely notice of the intent to file the brief under Rule 37.2(a), and granted consent. Pursuant to Rule 37.3, letters of consent to the filing of this brief have been filed with Clerk of Court.

SUMMARY OF ARGUMENT

The petition for writ of certiorari should be granted. The court of appeals' opinion departs sharply from a long and unbroken line of decisions of this Court and the lower courts – decisions that have unfailingly recognized the right of students not to be compelled to recite the Pledge of Allegiance against their will. The opinion also creates a direct and specific split with the Third Circuit on the question presented to this Court. *See Circle School v. Pappert*, 381 F.3d 172 (3d Cir. 2004).

In upholding a Florida statute that limits students' clearly established right to abstain from reciting the Pledge of Allegiance in school, the court of appeals created a new parental right to control the exercise of their children's conscience. The Eleventh Circuit's holding conflicts sharply with bedrock precedent of this Court, not only with respect to the right of students to be free from compelled professions of belief, but also by inventing a category of supposedly permissible regulation of student speech not recognized in this Court's jurisprudence, and by stretching beyond recognition this Court's precedents concerning parents' rights.

Moreover, the panel opinion ignores the settled law of this Court that restrictions on speech that discriminate according to viewpoint are almost invariably unconstitutional, and the opinion fails to apply the strict scrutiny that is required. Even if parents had the far-reaching rights attributed to them by the court of appeals, the statute could not pass strict scrutiny, among other reasons, because it

is not the least restrictive means of achieving those rights. The opinion also misapplies this Court's precedents on overbreadth. Such a direct derogation from core First Amendment principles cannot stand.

ARGUMENT

I. THE COURT OF APPEALS' OPINION DEPARTS FROM BEDROCK FIRST AMENDMENT PRINCIPLES CONCERNING STUDENTS' RIGHTS TO ABSTAIN FROM RECITING THE PLEDGE OF ALLEGIANCE.

If there is any fixed star in the constitutional jurisprudence of the last six decades, it is the holding of *West Virginia Board of Education v. Barnette*: The First Amendment, as applied to the states through the Fourteenth Amendment, protects schoolchildren's freedom of conscience to refrain from saluting or pledging allegiance to the flag. 319 U.S. 624 (1943). *See Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 417 (3d Cir. 2003) ("For over fifty years, the law has protected elementary students' rights to refrain from reciting the pledge of allegiance to our flag"); *Holloman v. Harland*, 370 F.3d 1252, 1259 (11th Cir. 2004) (student's right to decline to say Pledge was so clearly established that teacher and principal could not claim qualified immunity for violating that right: "Under *Barnette*, any reasonable person would have known that disciplining ... for refusing to recite the pledge impermissibly chills ... First Amendment rights"). To tamper with or weaken the holding of *Barnette* is to tarnish an icon that stands for the freedom of all

Americans to resist demands for political orthodoxy, however veiled.

In the absence of "grave and immediate danger to interests which the State may lawfully protect," 319 U.S. at 639, the First Amendment forbids the sort of conditions on liberty imposed by the Florida law at issue. Until the Eleventh Circuit here departed from this bedrock precedent, both federal and state courts had without exception affirmed students' right to abstain from Pledge recitation, striking down various attempts to narrow its application or to encumber its exercise.[2]

Courts have consistently refused to uphold preconditions or consequences placed on students' right to abstain from reciting the Pledge. *See Circle School*, 381 F.3d 172 (striking down statutory parental notification requirement when students abstained from reciting Pledge); *Lipp v. Morris*, 579 F.2d 834 (3d Cir. 1978) (striking down requirement that abstaining students stand for Pledge); *Banks v. Bd. of Public Instruction*, 314 F. Supp. 285, 295 (S.D. Fla. 1970), *aff'd*, 450 F.2d 1103 (5th Cir. 1971) (same); *Goetz v. Ansell*, 477 F.2d 636 (2d Cir. 1973) (striking down requirement that abstaining student either stand or leave room); *Frain v. Baron*, 307 F. Supp. 27, 33 (E.D.N.Y. 1969) (finding requirement that abstaining student leave room unconstitutional, regardless of whether it constituted punishment).

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[2] In the wake of the Eleventh Circuit's opinion, a district court has now suggested that a parental opt-out provision like Florida's is constitutional. *Croft v. Perry*, 604 F. Supp. 2d 932, 941 (N.D. Tex. 2009). If this Court does not correct the Eleventh Circuit's misstep, others may follow.

Similarly, courts have consistently rejected limiting constructions of *Barnette* that restrict the right to abstain from Pledge recitation to only those students whose motivations were deemed acceptable. *See State v. Lundquist*, 278 A.2d 263 (Md. 1971) (invalidating statute that allowed only those objecting for religious reasons to abstain from Pledge); *Holden v. Board of Education*, 216 A.2d 387, 389 (N.J. 1966) (rejecting argument that exception to statutory Pledge requirement for students with "conscientious scruples" "was never intended to be so broadly construed as to include" beliefs of Black Muslim students); *Sheldon v. Fannin*, 221 F. Supp. 766, 775 (D. Ariz. 1963) (upholding students' right to express beliefs by refusing to stand for national anthem, "no matter how unfounded or even ludicrous the professed belief may seem to others").

Despite the abundance and uniformity of this precedent, the court of appeals in this case accepted the state's arguments that placing an explicit condition on students' right to abstain from reciting the Pledge could be justified by waving the banner of "parents' rights" – as if none of the dozens of previously decided cases had involved parents with an interest in their children's upbringing, or the possibility of a parent wishing her child to honor the flag had failed to occur to any previous court.

If the student Pledge requirements at issue in *Barnette* and subsequent cases had been struck down on the basis that they violated the rights of *parents* who did not wish their children to be compelled to recite the Pledge, then the constitutional defect could perhaps have been

remedied by the parental opt-out provision at issue here. But the courts said no such thing. *See Barnette*, 319 U.S. at 630 ("The sole conflict is between authority and rights of *the individual*") (emphasis added); *id.* at 637 (noting the importance with respect to young students of "scrupulous protection of Constitutional freedoms of *the individual*") (emphasis added).

II. THE OPINION DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER COURT OF APPEALS ON THE SAME IMPORTANT MATTER.

In addition to departing from the long line of cases refusing to narrow or encumber students' right to abstain from Pledge recitation, the panel's decision in this case creates a direct split of authority between courts of appeals on the question presented to this Court. In 2004 the Third Circuit struck down a Pennsylvania statutory provision requiring schools to notify parents when students declined to recite the Pledge.[3] *Circle School*, 381 F.3d 172. The court found the provision viewpoint discriminatory (there was no notification to parents whose children did recite the Pledge) and therefore subject to strict scrutiny. *Id.* at 180. The statute could not withstand such scrutiny because the provision furthered no compelling state interest. *Id.*

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[3] The provision was part of a 2002 Pennsylvania statute that required schools to hold daily recitations of the Pledge (or national anthem). The statute explicitly gave students the option of refraining from recitation, but called for parental notification of parents of refraining students. *Circle School*, 381 F.3d at 174.

at 180-81. The court also noted that the provision "may have been purposefully drafted to chill speech by providing a disincentive to opting out of [the] Act." *Id.* at 180.

The decision in the instant case is clearly at odds with *Circle School*. If the chilling effect of parental notification unconstitutionally burdens students' speech, then *a fortiori* requiring parental consent is an unconstitutional encumbrance, as the district court recognized in the present case: "While the Court disagrees as to the constitutionality of the statute in *Circle School*, the statute at issue here is far more restrictive." *Frazier v. Alexandre*, 434 F. Supp. 2d 1350, 1365 (S.D. Fla.). Further, the Florida statute is equally viewpoint discriminatory: It allows parents through inaction to require their children to recite the Pledge, while not making it possible for parents to require their children to refrain.

III. THE PUTATIVE PARENTAL RIGHTS EXCEPTION REPRESENTS A RADICAL DEPARTURE FROM THIS COURT'S PRECEDENTS CONCERNING THE FREE SPEECH RIGHTS OF STUDENTS.

In suggesting that the state may limit students' freedom of expression on the basis of their parents' (presumed) preferences, the court of appeals invented an entirely novel – and broad – exception to the principles enunciated by this Court governing student speech rights.

While this Court has acknowledged that "the constitutional rights of students in public school are

not automatically coextensive with the rights of adults in other settings," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), it has narrowly delimited the respects in which their free speech rights differ. A student's right to free expression may be more circumscribed than that of an adult when the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 509 (1969) (citation omitted); when it would expose children to "vulgar speech [or] lewd conduct . . . wholly inconsistent with the 'fundamental values' of public school education," *Fraser*, 478 U.S. at 684-86; when it "might reasonably [be] perceive[d] to bear the imprimatur of the school," *Kuhlmeier v. Hazelwood School Dist.*, 484 U.S. 260, 271 (1988); or when it is "reasonably viewed as promoting illegal drug use." *Morse v. Frederick*, 551 U.S. 393, 127 S.Ct. 2618, 2625 (2007). The infrequency and narrowness with which this Court has recognized exceptions to the rule of *Tinker* suggest that lower courts are not free to devise their own additions to this list.

Thus, before this Court's recent decision in *Morse*, it was widely held that the first three distinctions were exhaustive. *See Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.) (student "[s]peech falling outside these categories [of "lewd, vulgar or profane language" or "speech that a reasonable observer would view as the school's own speech"] is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or

interfere with the right of others"); *accord Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006); *Chandler v. McMinnville School Dist.*, 978 F.2d 524, 529 (9th Cir. 1992); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 441-442 (5th Cir. 2001); *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 540 (6th Cir. 2001).

While this Court in *Morse* identified a further narrow area in which "*Tinker*'s general rule" does not apply, there is no precedent for allowing lower courts to discover new categories of exceptions. Yet the Eleventh Circuit has here in effect purported to do just that, adding a novel category of permissible infringements on student speech – restrictions in furtherance of parental rights – that runs directly counter to the principles set forth in *Tinker* (to say nothing of *Barnette*). There is no precedent, and no reasonable basis, for this venture.

IV. THE PANEL OPINION CONFLICTS WITH SETTLED LAW REGARDING THE RELATIONSHIP BETWEEN STUDENT RIGHTS, PARENTAL RIGHTS, AND THE PREROGATIVES OF THE STATE.

The panel opinion was premised on an unprecedented and implausible conception of the scope of parents' due process rights to direct their children's upbringing and education. The court accepted the state's argument that those rights could justify the state's infringement of students' freedom of conscience. But the state could permissibly override students' freedom in this way only if parents' due process rights extended so far as a right

to enlist the state in imposing parents' preferences on unwilling schoolchildren, without regard for the minors' own fundamental rights.

If parents do not have such a right against the state, then the state cannot voluntarily offer to impose *actual* (still less, as in this case, *presumed*) parental preferences, when doing so violates students' fundamental rights against the state. As Judge Barkett pointed out, the state cannot delegate a right "that the State constitutionally cannot itself possess. The State cannot give what it does not have." *Frazier v. Alexandre*, 555 F.3d 1292, 1297 (11th Cir. 2009) (Barkett, J., dissenting from denial of rehearing *en banc*) (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976)).

On the other hand, the panel's assumption that parents do have such a right against the state represents a sharp departure from established law concerning the relation between the public school system and parents' due process rights.

A. This Court's Precedents Concerning Parents' Right to Direct the Education and Upbringing of Their Children Do Not Support the Sort of Positive Right Against the State Assumed in the Panel Opinion.

The cases relied on by the panel do not support the existence of a parental right to enlist state compulsion: "The parental right of upbringing is not a positive right that gives parents the power to *invoke* the aid of the State against a minor's exercise of constitutional rights, but a negative right that

provides for protection of that right *against the State*." 555 F.3d at 1298 (Barkett, J., dissenting) (emphases in original). As this Court has held with respect to the free exercise clause, the Bill of Rights is "written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Bowen v. Roy*, 476 U.S. 693, 699 (1986).

Decisions of this Court vindicating parental rights in the context of laws regulating the schooling of children have concerned the rights of parents who wanted their children free from state compulsion, not the rights of parents who sought to impose state compulsion on their children. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exempting Amish parents from subjecting their children to state-required school attendance past eighth grade); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (striking down requirement that parents send children to public school); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating ban on teaching foreign languages to students before they completed eighth grade). *Pierce* and *Yoder* "have contributed to a line of decisions suggesting the existence of a constitutional parental right against undue, adverse interference *by the State*." *Bellotti v. Baird*, 443 U.S. 622, 639 n.18 (1979) (emphasis added). This Court in *Yoder* explicitly stipulated that it was not considering a situation in which the children's desires concerning school attendance were contrary to those of their parents. 406 U.S. at 231.

Nothing in these cases supports the thesis that the state may violate students' fundamental

rights of free expression on behalf of parents' rights to direct their children's upbringing, or that parents have a right that the state do so. To the contrary, there is ample precedent making clear that parents have little, if any, right to direct public schools' education of their children, even when doing so would *not* violate students' fundamental rights.

B. The Decision Conflicts With Settled Law That Parents Lack a Right to Enlist Schools in Enforcing Their Personal Morality.

Parents do not have a constitutional right to insist that public schools teach their children in accordance with the parents' beliefs, no matter how fervently and sincerely held. When parents have brought legal challenges to school policies or curricula on the basis of their due process right to direct their children's education and upbringing, courts have consistently held that parents have no fundamental right to dictate what or how public schools teach their children. *See Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003) ("*Meyer*, *Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught"; *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 396 (6th Cir. 2005) ("While parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child"); *accord Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 534 (1st Cir. 1995); *Swanson v. Guthrie Indep.*

Sch. Dist., 135 F.3d 694, 699 (10th Cir. 1998); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001).

In all of these cases, courts have held that parents do not have a right to direct how schools educate their children, even though deference to parental wishes in these cases would not have infringed on students' constitutional rights. *A fortiori*, parents do not have a right to direct how schools educate their children when, as with parents' (presumed) wishes that their children be compelled to recite the Pledge, deference to parents' wishes *would* infringe on students' rights. Therefore, when Florida schools compel students to recite the Pledge, they *cannot* be doing so on the basis of parents' rights, because parents have no right that their children be made to recite the Pledge in school (or even that the Pledge be said in school at all).

Of course, schools may *choose* to accede to some parental wishes about curriculum, *Brown*, 68 F.3d 525, or dress codes, *Blau*, 401 F.3d 381, just as they may choose to hold a Pledge recitation. It does not follow, however, that schools can choose to *require* students to recite the Pledge in deference to parents' wishes. Whereas schools have wide latitude to determine curricula or dress codes, or to hold patriotic ceremonies with voluntary participation, they have no right themselves to impose a Pledge requirement.

In short, parents have no right to mandate that schools require their children to recite the Pledge. And if parents have no such right, then

schools – which may not of their own accord require Pledge recitation – can have no right to require it on parents' behalf.

C. The Decision Conflicts With Precedent That Minors' First Amendment Rights Are Not Subject to Parental Consent.

Minors' free speech rights may not constitutionally be conditioned on parental consent. As the Seventh Circuit has found in a case outside the school context, "the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (Posner, J.). The court there enjoined enforcement of a city ordinance limiting minors' access to violent video games unless accompanied by a parent, because of its infringement on minors' free speech rights. The court rejected the city's argument that a child's free speech rights in this context were "secured by the right of the parent ... to permit his or her child ... to play these games." *Id.* at 578. To the contrary, the court found it "obvious that [children] must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen" so that they may "become well-functioning, independent-minded adults and responsible citizens...." *Id.* at 577.

The point applies equally in the present case. A student's freedom of conscience to refrain from speech that may be counter to her political beliefs is surely more central to the First Amendment than is

access to violent video games; further, parents have no greater interest in compelled recitations of patriotism than they do in protecting their children from exceptionally violent video games. If access to violent video games may not be conditioned on parental consent, surely the exercise of one's conscience cannot be, either.

V. THE PANEL OPINION IGNORES ESTABLISHED LAW REQUIRING VIEWPOINT NEUTRALITY.

Even if the rights of parents to control their children's education were as robust as the panel opinion's analysis suggests, and even if students' First Amendment rights were as feeble as that opinion implies, Florida's Pledge statute still would violate the First Amendment because it discriminates according to viewpoint on a subject at the core of constitutional protections, and neither serves a compelling state interest nor constitutes the least restrictive means of achieving the state's interest.

A. The Statute Is Not Viewpoint Neutral.

Not only does the statute provide for the state to enforce parents' wishes only with respect to certain patriotic content, but it does so solely with respect to the state-favored point of view.

Contrary to the panel opinion, the statute offers no provision for enforcing the wishes of "a parent [who] request[s] that his child not recite the Pledge – even where the child wishes to recite."

Frazier v. Winn, 535 F.3d 1279, 1285 (11th Cir. 2008). In an unavailing effort to show that the statute is viewpoint neutral, the court below cited the statute – "Upon written request by his or her parent, the student *must* be excused from reciting the pledge," *id.* (quoting Fla. Stat. § 1003.44(1)) (emphasis added by court) – but then gave it a meaning its words simply cannot bear. The plain meaning of excusing a student is simply that the student will not be required to say the Pledge, not that he will be prohibited from saying the Pledge if he wishes but his parents object. *See People v. Perkins*, 473 Mich. 626, 651 n.11 (2005) (to "'[e]xcuse' means 'to release from an obligation or duty,'" quoting dictionary); *Pollett v. Rinker Materials Corp.*, 477 F.3d 376, 378 (6th Cir. 2007) ("dictionary defines 'excuse' as 'to grant exemption or release"). Under section 1003.44, a written request from a parent releases a student from his obligation to recite the Pledge. It does not, however, *prohibit* him from reciting the Pledge. Objecting parents have no means for getting the school to compel a student to refrain from Pledge recitation. Thus it is not true that, as the court of appeals would have it, "the statute ultimately leaves it to the parent whether a schoolchild will pledge or not." 535 F.3d 1284.

The court of appeals imported into the statute a viewpoint-neutrality that is simply not there. *See Salinas v. United States*, 522 U.S. 52, 59-60 (U.S. 1997) ("[s]tatutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature").

The fact that the statute – as written – allows schools to compel favored patriotic speech at the behest of parents (or, more accurately, whenever parents don't actively object), but affords parents no opportunity to require schools to compel contrary speech or silence if the parents so wish, suggests that the state's invocation of parental rights may conceal precisely the sort of attempt to enforce orthodoxy that was so forcefully rejected in *Barnette*. In any event, it means that the statute is, plainly, not viewpoint-neutral.

B. The Statute Should Be Invalidated Solely on the Basis of Viewpoint Discrimination.

This Court has suggested that a statute that – like section 1003.44 – is viewpoint discriminatory may be struck down without further inquiry. *See Schacht v. United States*, 398 U.S. 58, 63 (1970) (provision "which leaves Americans free to praise the war in Vietnam but can send persons ... to prison for opposing it, cannot survive in a country which has the First Amendment"); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("some purported interests – such as a desire ... to exclude the expression of certain points of view from the marketplace of ideas ... are so plainly illegitimate that they would immediately invalidate the rule"); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("nor may [the state] discriminate against speech on the basis of its viewpoint").

"Government action . . . that requires the utterance of a particular message favored by the

Government" contravenes the First Amendment as much as action "that stifles speech on account of its message." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994). Therefore, it would be possible to find section 1003.44 unconstitutional, without further inquiry, simply because it requires utterance of only a particular government-favored message.

Even if it were constitutional for the state to compel student speech in service of parents' desires, it could not selectively enforce parental wishes only with respect to favored viewpoints, just as the state may not regulate speech so as to favor one viewpoint over others, even when regulating "unprotected" speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992). For example, a city council may proscribe obscene displays, but it cannot constitutionally "prohibit[...] only those legally obscene works that contain criticism of the city government." *Id.* at 384. While the issue here is not restrictions on speech, but compulsion of speech, the same principle applies. Even if parental wishes somehow stripped student speech of its protections, compulsion of student speech according to parental wishes could be constitutional, at best, only if it neutrally enforced all parental viewpoints.

C. The Statute Cannot Withstand Strict Scrutiny.

Even if a finding of viewpoint discrimination is not the end of the inquiry, it means at least that strict scrutiny is required. "Our precedents ... apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.... Laws

that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny." *Turner Broad.*, 512 U.S. at 642. A regulation of speech that discriminates among viewpoints is constitutional "only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 540 (1980). To be precisely drawn, the regulation must be accomplished through the means least restrictive of protected speech. *United States v. Playboy Entm't Group*, 529 U.S. 803, 814 (2000).

Strict scrutiny leads to the same conclusion here as immediate invalidation, for section 1003.44 neither serves a compelling state interest nor constitutes the least restrictive means of achieving the state's goal.

1. The Statute Does Not Serve a Compelling State Interest.

Section 1003.44 does not serve a compelling state interest. Florida's stated interest is to protect the rights of parents to direct their children's education. Because parents have no fundamental right to direct what is taught in public schools, as explained *supra* at IV.B, parents' interest in directing school practices can be overridden when the state has a rational basis for doing so. *See*, e.g., *Littlefield*, 268 F.3d at 291. If the state interest in enforcing parental wishes in schools were a compelling one, it could not be so readily overridden.

2. The Statute Does Not Employ the Least Restrictive Means to Achieve Its End.

The state has also failed to choose the least restrictive means of achieving its purported interest. The statute compels the speech of all students whose parents do not take the affirmative step of writing, signing, and submitting a request to excuse their children. A parent's failure to submit an opt-out request could reflect a desire that the child recite the Pledge, but it could equally well reflect the parent's indifference, fear of coming to the attention of authorities (perhaps because of immigration status), fear of making waves or angering authority, illiteracy or shame at poor writing skills, to name only a few possibilities. It could also indicate – as any parent of a school-aged child will recognize – a failure of communication between child and parent. A policy compelling Pledge recitation only upon parents' affirmative request would protect the school's stated interest in a manner that restricts significantly less protected speech than does the current policy.

D. Viewpoint Discrimination is No Less Illegitimate in Regulation of Student Speech.

Viewpoint discrimination is illegitimate in regulation of student speech as well. *See Tinker*, 393 U.S. at 510 (finding it relevant to unconstitutionality of school's ban on anti-war black armbands that "school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance"); *Fraser*, 478 U.S. at 685

(distinguishing impermissible sanctions in *Tinker* on ground that "the penalties imposed in this case were unrelated to any political viewpoint"). Given that a student's silence during an official school Pledge ceremony does not involve lewd language, cannot plausibly be taken to represent the official school position, and has no connection with advocating illegal drug use, it is governed by the "rule of *Tinker*" that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Tinker*, 393 U.S. at 511. The principle applies at least as forcefully to the compelled expression of one particular opinion. "It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." *Barnette*, 319 U.S. at 633.

Under any applicable analysis, the statute at issue in this case constitutes unconstitutional viewpoint discrimination.

VI. THE PANEL DECISION MISAPPLIES FIRST AMENDMENT OVERBREADTH DOCTRINE.

"[I]n the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation ... in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

Even if there were some constitutional applications of section 1003.44 – a dubious proposition – the statute must be judged void for overbreadth in at least two respects: in applying to students whose parents have no interest in their reciting the Pledge, and in applying to students of all ages.

A. The Statute is Substantially Overbroad in Applying to Students Whose Parents Are Not Interested in Students' Pledge Recitation.

Section 1003.44 reaches not only students whose parents want them to recite the Pledge, but also students whose parents for other reasons fail to submit paperwork excusing them. *See supra* at V.C.2. A substantial proportion of students is bound to fall into this category. Anyone working in sales can attest to the large difference in effect between an 'opt-out' and an 'opt-in' policy. *See* Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 Vand. L. Rev. 1583 (1998) (observing that most people accept default terms). The fact that it is impracticable to determine how many students fall into this category does not prevent a finding that the number would be substantial. *Cf. Reno v. ACLU*, 521 U.S. 844, 880 (1997) (striking down statute seeking to protect minors from exposure to indecency on Internet, because it "unquestionably silences some speakers whose messages would be entitled to constitutional protection").

B. The Statute is Substantially Overbroad in Applying to Older Students.

The court of appeals tacitly admitted that the constitutionality of the statute was suspect as applied to high school students. *See* 535 F.3d at 1285 (noting the potential unconstitutionality of the statute as applied to "a mature high school student"). And rightly so: the idea that the exercise of fundamental rights of free expression by high school students outside the home should require parental consent is implausible, to say the least. That is enough to establish substantial overbreadth.

C. The Statute Has No "Plainly Legitimate Reach."

Furthermore, the application of section 1003.44 even to elementary and middle school students is constitutionally questionable. Whether the overbreadth of a statute is substantial is "judged in relation to the statute's plainly legitimate reach." *Broadrick v. Oklahoma*, 413 U.A. 601, 605 (1973). Because the statute here is at best constitutionally dubious even as applied to younger children, there is no need for a numerical comparison: there is no "plainly legitimate reach" with which to compare the statute's overbreadth.

The holding of *Barnette* was not limited to students of a certain age. To the contrary, the Court stated: "If there are any circumstances which permit an exception, they do not now occur to us." 319 U.S. at 642. *See also id.* at 644 (Black and Douglas, JJ., concurring) (warning against "compelling little

children to participate in a ceremony"). *Barnette* has been held binding with respect to younger students as much as to older ones. *See, e.g.*, *Rabideau v. Beekmantown Cent. Sch. Dist.*, 89 F. Supp. 2d 263, 265 (N.D.N.Y. 2000) (nine-year-old special education student); *Sheldon*, 221 F. Supp. at 768 (elementary school students). *See also Walker-Serrano*, 325 F.3d at 417 (law protects "elementary students' rights to refrain from reciting the pledge"). The students whose right to quiet protest were upheld in *Tinker* included an eight-year-old second grader. 393 U.S. at 516 (Black, J., dissenting).

Indeed, any reasons for attributing less robust rights of free expression to younger students than to older ones fail to apply when children are compelled to pay lip service to orthodoxy. If a child is too young to understand the Pledge, that may be a reason to deny him a forum to discuss it, but it is not a reason to compel him to recite it. To the contrary, a student's youth makes compelled recitation all the more objectionable. "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637. "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example." *Fraser*, 478 U.S. at 683. "[S]tate-operated schools may not be enclaves of totalitarianism." *Tinker*, 393 U.S. at 511.

CONCLUSION

Because the court of appeals decided important questions of law in ways that deviate from bedrock decisions of this Court, and because the opinion below directly conflicts with a decision of another court of appeals on the same important matter, certiorari should be granted.

Respectfully submitted,

SETH E. MERMIN
Counsel of Record
THOMAS BENNIGSON
PUBLIC GOOD
3130 Shattuck Avenue
Berkeley, CA 94705
(510) 548-4064
Counsel for Amici Curiae

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